THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Jamie T. Nesbitt,
Appellant,

v.

Cenlar FSB, Amerihome Mortgage Company, LLC, and Lakeview Loan Services, LLC,
Respondents.

Appellate Case No. 2024-000371

Unpublished Opinion No. 2026-UP-419

Appeal From Spartanburg County

Shannon Metz Phillips, Master-in-Equity

Lower Ct. Case No. 2021-CP-42-04184

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**PETITION FOR REHEARING**

Appellant Jamie T. Nesbitt respectfully petitions this Court for rehearing under Rule 221(a), SCACR, and states with particularity the points she believes were overlooked or misapprehended. She does not reargue the appeal. Each point below is drawn from the face of the opinion or from Respondents' own summary judgment affidavit.

**POINTS OVERLOOKED OR MISAPPREHENDED**

1. The opinion relies on the payoff statement's caution that an escrow disbursement creating a *shortage* and causing Respondents to *advance* their own funds would increase the amount due. Respondents' affidavit establishes that the escrow surplus was $1,471.31 and the disbursement was $1,363.46. There was no shortage and no advance.

2. The opinion states that Appellant “failed to come forth with evidence to dispute” that the taxes were paid from escrow. The record contains the closing attorney’s sworn affidavit, his canceled trust-account check payable to Spartanburg County, and the County’s deposit endorsement on its reverse.

3. Section 29-3-310 applies to a holder who has received “full payment or satisfaction *or to whom a legal tender has been made*.” S.C. Code Ann. § 29-3-310 (2007). The opinion quotes that language and then holds the section inapplicable “unless the mortgage has been paid in full.” The legal-tender branch is not addressed.

4. The rulings on breach of fiduciary duty and negligence rest on the premise addressed in point 1: that the December 3 disbursement was authorized and thereby rendered the December 7 tender insufficient.

Appellant asks that rehearing be granted and the order granting summary judgment reversed.

## I. RESPONDENTS’ OWN AFFIDAVIT ESTABLISHES THAT NO ESCROW SHORTAGE AND NO ADVANCE OCCURRED.

The opinion quotes the November 9 payoff statement’s caution: “If an escrow disbursement creates a shortage in the escrow account and causes us to advance our funds, the amount of the advance will be added to the amount due and must be paid at time of payoff." That clause is conditioned on two facts: a shortage, and an advance of the servicer's own funds.

Neither occurred, on Respondents' own numbers. The affidavit of Daniel Anderson, Vice President of Document Execution for Cenlar, states that the November 9 payoff figure of $178,774.37 was calculated by subtracting "the surplus funds in the escrow account ($1,471.31)" from the principal, interest, and premium. (R.p. 275, Anderson Aff. ¶ 13.) The same affidavit states that "[o]n December 3, 2020, $1,363.46 was disbursed from the escrow account." (R.p. 275, Anderson Aff. ¶ 15.)

$1,471.31 less $1,363.46 leaves $107.85. The escrow account was never short. Respondents advanced nothing. The clause on which the opinion relies was, by its own terms, not triggered.

The opinion also quotes the statement's warning that "the required payoff amount MAY CHANGE if . . . advances occur on or after the Effective Date." That clause turns on the same fact, and the closing attorney testified that no advance occurred. Respondents "took client money out of their escrow" and "sent that to what we were informed was a third party, not even their company"; they "did not advance it for payment of taxes, because we paid the taxes." (R.p. 143, Ray Dep. 35:5-20.)

Respondents' theory is different, and it is stated in the next paragraph of the affidavit: because the payoff figure had been "conditioned on escrow surplus of $1,471.31," the disbursement reduced the credit and so increased the sum due. (R.p.

275, Anderson Aff. ¶ 16.) That may or may not be a sound reading of the payoff statement. It is not the clause the opinion quotes, and whether a voluntary disbursement made four days before the stated expiration of a payoff letter may be charged against the payoff it had already credited is a question the opinion does not reach.

## II. THE RECORD CONTAINS THE EVIDENCE THE OPINION STATES WAS NOT PRODUCED.

The opinion states that "Respondents provided evidence that because the property tax payment was made, the payoff amount increased before the payoff attempt," and that "Nesbitt has failed to come forth with evidence to dispute this."

She came forward with a canceled check. The affidavit of Timothy Ray, Esquire, the closing attorney, is at R.p. 278-279. He swears he is "the custodian of these records and am competent to authenticate them." (¶ 4.) He attaches, as Exhibit One, the front and back of his trust account check number 11969, "made payable to the order of Spartanburg County on December 7, 2020, in the amount of One Thousand Three Hundred Sixty-Two dollars and Forty-Six Cents" ($1,362.46), and swears that the check "was payment in full for the real property taxes on this property for tax year 2020." (¶ 6.) He swears that the reverse of the check "shows that check 11969 was deposited by Spartanburg County," and that his bank records show it "cleared my account on December 11, 2020." (¶ 7.) He swears the payment "satisfied Ms. Nesbitt's real property taxes for the tax year 2020 in full." (¶ 8.) The check and the bank record are in the Record at R.p. 280-281.

The 2020 taxes were thus discharged by a payment of $1,362.46. The sum Respondents disbursed from escrow four days earlier was $1,363.46. (R.p. 275, Anderson Aff. ¶ 15.) The two figures are not the same. The County kept Mr. Ray's.

Respondents' affiant does not contradict this. He states that on December 19, 2020, "Cenlar requested that Spartanburg County refund the $1,363.46 property tax payment made on December 3, 2020, because Cenlar was informed Ms. Nesbitt and Mr. Ray would make the payment themselves." (R.p. 276, Anderson Aff. ¶ 23.) A request that the County return the money is difficult to explain if the money had discharged the obligation it was sent to discharge.

The conflict is not one of characterization. Mr. Anderson swears that the December 3 disbursement was made "to pay Ms. Nesbitt's scheduled property taxes." (R.p. 275, Anderson Aff. ¶ 15.) Mr. Ray — a member of the bar of this State, swearing as custodian of his own trust account records — states that he paid those taxes in full on December 7, that Spartanburg County deposited his check, and that it cleared on December 11. (R.p. 278-279, Ray Aff. ¶¶ 4, 6-8.) Twelve days after that, Respondents asked the County to return their money. (R.p. 276, Anderson Aff. ¶ 23.)

Whether the 2020 taxes were discharged by Respondents' disbursement or by Mr. Ray's check is therefore a question on which the record contains sworn testimony and documentary evidence pointing in opposite directions. The summary judgment standard mirrors the standard for a directed verdict. *The Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 461, 892 S.E.2d 297, 300 (2023). A court could not direct a verdict that the averment of Respondents' own officer outweighs a canceled check the payee endorsed and deposited. Appellant respectfully submits that the same conflict forecloses summary judgment.

A canceled check bearing the payee's deposit endorsement is a specific fact, not an allegation. *See Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 558-59, 671 S.E.2d 79, 85 (Ct. App. 2008). The same passage of *Gauld* states that "[t]he party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact," and that "[i]f triable issues exist, those issues must go to the jury." *Id.* at 558, 671 S.E.2d at 84-85. Whether that check, or the December 3 disbursement, discharged the 2020 taxes, and what follows for the payoff figure, is a conclusion drawn from the evidence, and this record permits more than one. "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) (reversing grant of summary judgment). Nor is summary judgment appropriate "where further inquiry into the facts of the case is desirable to clarify the application of the law," and "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant." *Id.*

The governing question is whether the non-moving party has shown a reasonable inference to be drawn from the evidence. *Kitchen Planners*, 440 S.C. at

460-61, 892 S.E.2d at 300. Appellant respectfully submits that she met that standard, and that the evidence by which she met it is not mentioned in the opinion.

## III. THE OPINION DOES NOT ADDRESS THE LEGAL-TENDER BRANCH OF SECTION 29-3-310.

The opinion holds: "First, as to her claims under section 29-3-310 of the South Carolina Code (2007), this section does not apply unless the mortgage has been paid in full." It then quotes the statute in full, with emphasis supplied.

The statute quoted reads, in its operative clause, that it governs "[a]ny holder of record of a mortgage who has received full payment or satisfaction or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate." S.C. Code Ann. § 29-3-310 (2007). The trigger is disjunctive and has three branches. Section 29-3-320 carries the same disjunctive forward, reaching a holder "having received such payment, satisfaction, or tender as aforesaid." S.C. Code Ann. § 29-3-320 (2007).

The distinction is not academic. A tender that is accepted is payment, and a statute that already reaches "full payment" would have no need of a third branch to reach it a second time. What work, then, does the legal-tender branch do, if not in the case of a tender refused?

Appellant argued below and on appeal that the December 7, 2020 wire of $178,774.37, in the exact amount and within the exact window stated by

Respondents' own payoff letter, constituted legal tender. Respondents admit in their pleadings that they provided that payoff figure: "Answering Defendants admit that on November 9, 2020, AmeriHome provided Plaintiff with a payoff statement for the loan in the amount of $178,774.37." (R.p. 17, Am. Answer ¶ 11.)

The holding that the section "does not apply unless the mortgage has been paid in full" resolves one branch of a three-branch trigger without reaching the branch on which she relied.

*Dykeman v. Wells Fargo Home Mortgage, Inc.*, 381 S.C. 333, 340, 673 S.E.2d 804, 807 (2009), states element (1) as "that he has made full payment of his 'debts,' including any applicable 'damages, costs, and charges.'" But *Dykeman* was decided on the *request* element. The Court said so: "This case, of course, has drawn our attention to the request element." The legal-tender branch was not before it. Appellant has located no South Carolina decision construing that branch. The question is open.

## IV. THE RULINGS ON BREACH OF FIDUCIARY DUTY AND NEGLIGENCE REST ON THE PREMISE ADDRESSED IN POINT I.

Appellant's second question on appeal was whether the circuit court erred in granting summary judgment on her claims for breach of fiduciary duty and negligence when Respondents' motion for summary judgment did not address those causes of action and they were not argued at the hearing. The Court addressed that question and held the claims were properly before the circuit court. Appellant does not ask the Court to revisit its reading of *Wright v. Sparrow*, 298 S.C. 469, 470-71, 381 S.E.2d 503, 504-05 (Ct. App. 1989).

She asks that the merits rulings that followed be reconsidered, for a reason common to Point I above. The opinion holds that Respondents did not breach a fiduciary duty because Appellant "failed to provide any evidence that Respondents were not acting in accordance with the note and mortgage by disbursing funds from the escrow account to pay Nesbitt's property taxes," and that Respondents "did not owe Nesbitt a duty of care to accept the insufficient payoff amount." Each holding depends on two premises: that the December 3 disbursement was an act taken in accordance with the loan documents, and that the December 7 tender was insufficient as a result.

Respondents' own affidavit places both in question. The escrow surplus credited in the November 9 payoff statement was $1,471.31; the disbursement was $1,363.46. (R.p. 275, Anderson Aff. ¶¶ 13, 15.) No shortage arose and Respondents advanced no funds of their own. Whether a voluntary disbursement in those circumstances was "in accordance with the note and mortgage," and whether the tender that followed was in fact insufficient, are conclusions drawn from the evidence rather than evidentiary facts. Appellant respectfully submits that the claims for breach of fiduciary duty and negligence rest on the same premise as the section 29-3-310 ruling and should be reconsidered together with it.

## CONCLUSION

The opinion cites *Gauld* for what a non-moving party must produce. The same page says what follows when she has: "If triable issues exist, those issues must go to the jury." *Gauld*, 380 S.C. at 558, 671 S.E.2d at 84 (quoting *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005)).

For the reasons stated, Appellant respectfully requests that the Court grant rehearing and, upon rehearing, reverse the order granting summary judgment and remand for trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on September 3, 2026, I served a copy of the foregoing Petition for Rehearing upon counsel for Respondents, addressed as follows:

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Service was made by electronic mail, in Adobe Acrobat portable document format, to the primary electronic mail address listed for each attorney in the Attorney Information System, in accordance with Rule 262(c)(3), SCACR, and the Order of the Supreme Court of South Carolina dated April 24, 2024. A copy of the transmitting electronic mail is enclosed with this certificate.

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