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SC Court of Appeals

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

APPELLATE CASE NO.: 2023-001844

CASE NO. 2019-CP-10-4503

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

Of Whom Curtis Rogers, Julie Rogers and Ashley Johnson Beshara Trustee
of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd
day of March 2020 are.....Appellants,

v.

Nationstar Mortgage LLC, Respondent.

**PETITION FOR REHEARING BY APPELLANTS CURTINGS ROGERS
AND JULIE ROGERS**

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Pursuant to Rules 219, 221 and 240, SCACR, Appellants Curtis Rogers and Julie Rogers (Rogers) respectfully file this Petition for reconsider and rehearing regarding its Order filed June 3, 2026. *Deutsche Bank Trust Company of Americas v. Ashley Johnson Beshara*, Unpublished Op. No. 2026-UP-277.

A petition for rehearing should be granted whenever it is shown that the Court has “overlooked” or “misapprehended” a point of fact or law. Rule 221(a) SCACR; *S.C. Coastal Conservation League v. Dominion Energy S.C., Inc.* 432 S.C. 217, 219 851 S.E.2d 699,700 (2020) (granting petition for rehearing). Respectfully, the Court’s opinion contains internal inconsistencies and overlooked or misapprehended material questions of law and fact. The Rogers request for rehearing or *en banc* consideration should be granted and the circuit court rulings reversed based on the arguments below. The Rogers further incorporate into this Petition and expressly reasserts into this Petition all arguments raised by Appellants in prior briefings and at oral argument and do not abandon or waive any such arguments.

INTRODUCTION

The case presents multiple issues but one that is novel and critically important under the South Carolina Rules of Civil Procedure: whether Rule 40(j), SCRCR, authorizes the perpetual dismissal and restoration of the same civil action without consequences or regard to the principles of finality embodied in the Rules of Civil Procedure and jurisprudence.

Appellants submit that the Opinion contains an inconsistency that creates substantial

uncertainty concerning the analysis of Rule 40(j), SCRCP which warrants clarification through rehearing. Additionally, the Opinion misapprehends the focal issue presented on appeal. Appellants contention has been that Rule 40(j), SCRCP has limits and if used repeatedly there are consequences such as in Rule 41(a) as referenced in the Notes to Rule 40(j), SCRCP. Appellants have not taken the position that Rule 40(j) literally incorporates Rule 41(a), SCRCP or that the two rules have identical procedural mechanics as the Opinion surmises. Rather the misapprehend position of Appellants is that the voluntary dismissal under Rule 40(j), SCRCP must be construed together with other rules of the same or similar subject matter. These failures of the Opinion along with other failures addressed below warrant the Court granting rehearing, withdrawing the Opinion and issue a substituted opinion that properly applies the principles of construction.

ARGUMENT

I. REHEARING SHOULD BE GRANTED BECAUSE THE OPINION CONTAINS AN INTERNAL INCONSISTENCY REGARDING ITS HOLDING AS TO RULE 40(j), SCRCP, MISAPPREHENDS RULE 40(j), SCRCP, THE 1994 AMENDMENT AND THE REPORTER'S NOTES, AND THE GOVERNING RULES OF CONSTRUCTION.

A. The Opinion Contains an Internal Inconsistency.

The Opinion sets forth the questions on appeal stating the first one as: "1. Did the circuit court err by finding that multiple Rule 40(j) motions did not operate as a decision on the merits and therefore did not bar the institution of this action?" (Op. p. 4.) While addressing the "effect of Rule 40(j) dismissals" the Opinion states:

"Accordingly, we hold the circuit court **did err** in finding that multiple Rule 40(j) dismissals ... did not act as an adjudication on the merits...." (emphasis added)

(Op. p. 7)

The "did err" holding plainly states the circuit court committed reversible error as the Rogers contend. It holds, as the Rogers argued that repeated Rule 40(j), SCRCP dismissals resulted

in an adjudication on the merits. Inconsistent with this holding however the Opinion affirms the circuit court ruling. In essence, within a short span of discussion, the Opinion on a focal issue on appeal proclaims the circuit court did err but affirms the opposite result. These two inconsistent positions on the same issue cannot stand and render the opinion inherently in conflict.

This inconsistency is a material ambiguity within the Opinion. It is not mere semantics. It impacts the focal issue regarding the construction of Rule 40(j), SCRCP and affects the reasoning of the Opinion. This inconsistency warrants rehearing under Rule 221, SCRAP.

B. The Opinion Misapprehends and Ignores Settled Principles Governing the Construction and Interpretation of the Rules of Civil Procedure, Fails to Reconcile Certain Language or Treat it in Harmony with Rule 41, SCRCP, Fails to Consider the Amendment and Notes and Deviates from Recognized Principles and Prior Authority.

Rule 40(j), SCRCP is regularly employed throughout South Carolina civil practice, including mortgage foreclosure actions, commercial litigation, probate matters, and complex civil cases. The construction adopted by the Opinion therefore affects the administration of civil justice statewide.

Appellants' position has been and is that repeated uses of Rule 40(j), SCRCP has consequences including consequences having the same legal effect as Rule 41, SCRCP. The Rules can have the same result of effectively ending a case with finality because they govern the same subject matter, dismissal.

The Opinion appears to have overlooked recognized principles of statutory construction or to give consideration to the impact of the 1994 amendment and accompanying Reporter's Notes argued by Appellants. The Opinion deviates from the following recognized principles:

- Procedural rules addressing the same subject matter must be construed together;
- The rules must be construed to be given their operative meaning and language

- should not be treated as surplusage;
- The Reporter’s Notes relating to the rules should be considered and not ignored; and
- Jurisprudence should be reconciled rather than conflated.

As recognized in the Opinion “[i]f 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 (Ct. App. 2019), and *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E. 2d 26 (2003). Not recognized in the Opinion and instead ignored is the principle recognized by the South Carolina Supreme Court that “[t]he language must also be read in a sense [that] harmonizes with its subject matter and accords with its general purpose.” *Eagle Container Co. v. County of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008); *see also*, *Marichris, LLC v. Derrick*, 384 S.C. 345, 352-53, 682 S.E.2d 301 (Ct. App. 2009)(“The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.”); and *Oulla v. Velazques*, 427 S.C 428, 441, 831 S.E.2d 450 (Ct. App. 2019)(“dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.”)

1. Rule 40(j), SCRCP and Rule 41, SCRCP both involve dismissals and the same subject matter.

The Opinion’s attempt to distinguish Rules 40(j) and 41, SCRCP is unavailing. The Opinion claims the Rules govern different situations. (Op. p. 5) The Opinion makes no effort to address the subject matter of the Rules. Rather it recites to the titles of the Rules and makes no effort to evaluate the language of the Rules. Titles and headings to statutes and rules “are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they cannot undo or limit what the text makes plain.” *Garner v. Houck*, 312 S.C.

481, 435 S. E. 2d 847 (1993). The Court's reference and reliance on the headings of the Rules does not change the underlying subject matter of the Rules.

The Opinion acknowledges Rule 40(j), SCRCP deals with dismissal. (Op. p. 6) The Opinion also acknowledges that Rule 41, SCRCP deals with dismissal. Irrespective of the titles of Rule 40(j) and Rule 41(a), SCRCP, they ultimately address the same subject matter, dismissal of an actions. The Court erred in its analysis and its failure to acknowledge the subject matter of the Rules. This error compounded additional errors.

2. Whether a dismissal is either voluntary or involuntary, multiple dismissals operate as an adjudication on the merits.

Equally unavailing is the Opinion's distinction between voluntary and involuntary actions. The Opinion postulates if an action is dismissed pursuant to an Order then the dismissal is an involuntary action and Rule 41(a), SCRCP can have no application. (Op. pp. 6-7) The Opinion contends that when Orders are involved any action addressed in the Order is therefore involuntary. This misapprehends the law and rules.

Rule 40(j), SCRCP by both its title and text requires a universal agreement by the parties. The title contains the word "agreement." The Rule specifically states the parties must agree in writing. Rule 40(j), SCRCP does not contain the word "Order." However, the Rule certainly contemplates the issuance of an order, since it references motions, notice of motion and a motion being heard. *see Goodwin v. Landquest Development, LLC* 414 S.C. 623, 779 S.E. 2d 826 (Ct. App. 2015). The fact that the written agreement is housed in an order does not render it an involuntary action on the part of the parties as suggested in the Opinion. (Op. p. 7) To suggest it does as here would render consent Orders subject to attack and potentially render them non-binding agreements as to all consenting parties.

The dismissals were voluntarily done. Because they are voluntary, they have legal

consequences. And because they were voluntarily done multiple times, they have the consequence of being final determinations on the merits.

If, however, the fact that the agreements were housed in Orders renders them involuntary acts as the Opinion suggests, then the Opinion runs afoul of the treatment of involuntary dismissals under the Rules of Civil Procedure. Rule 41(b), SCRPC, is entitled “Involuntary Dismissal: Non-suit; Effect Thereof.” In the last sentence of second paragraph it specifically states:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, ***operates as an adjudication upon the merits.*** (emphasis added)

The language of the rule is clear. An involuntary order, unless it states otherwise, **operates as an adjudication upon the merits.** The Opinion ignores this codified principle. The Opinion further ignores this principle raised by Appellants and noted by Professor Flanagan. James F. Flanagan, South Carolina Civil Procedure, 490 (2020 Ed.) (“Dismissal, unless otherwise stated, is an adjudication on the merits.”) In direct contravention of the law whether it be as to a voluntary or involuntary order, the Opinion holds multiple orders of dismissal are permissible if not indefinite and have no consequences. The correct determination is multiple dismissals operate as decisions on the merits ending the matter with finality.

3. The rules of construction require the Rules of Civil Procedure be harmonized not treated in isolation.

The Opinion concludes that Rule 40(j), SCRPC and Rule 41(a), SCRPC are separate procedural devices and therefore the two-dismissal provision contained in Rule 41(a), SCRPC has no bearing upon repeated dismissals under Rule 40(j), SCRPC. This conclusion is made based upon an improper analysis: procedural device versus subject matter.

The South Carolina Supreme Court has repeatedly instructed that the Rules of Civil Procedure are interpreted according to the same principles applicable to statutes. *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26 (2003). Likewise, statutes and procedural rules addressing the same subject matter are to be read *in pari materia* so as to produce a harmonious result rather than conflicting constructions. *Marichris, LLC v. Derrick*, 384 S.C. 345, 352-53, 682 S.E.2d 301 (Ct. App. 2009); *Oulla v. Velazques*, 427 S.C. 428, 441, 831 S.E.2d 450 (Ct. App. 2019).

The Opinion does not discuss or explain why these well-established rules of construction do not apply here. The Opinion does not address the subject matter of Rule 40(j), SCRPC in comparison to Rule 41, SCRPC. Instead, the Opinion effectively isolates Rule 40(j), SCRPC from the remainder of the Rules of Civil Procedure and construes it without reference to Rule 41, SCRPC or the official Reporter's Notes accompanying the 1994 amendment. That approach does not attempt to harmonize rules of the same subject matter. This is contrary to the established rules of construction.

4. The Reporter Notes to Rule 40(j), SCRPC should have been considered.

Significantly, the Opinion does not give any deference to the official Reporter's Notes to the 1994 amendment of Rule 40, SCRPC, when considering the "Effect of Rule 40(j) Dismissals." (Op. p. 5-8).¹ Those Notes are not incidental commentary; they provide the clearest explanation of the purpose of the amendment and the intended operation of Rule 40(j), SCRPC. Notably, they were given some attention by the South Carolina Supreme Court in its evaluation of Rule 40(j),

¹ The Opinion does reference the Reporter's Notes on page 9 when addressing the malicious prosecution cause of action.

SCRCP in *Maxwell v. Genez*, 356 S.C. 617, 591 S.E. 2nd 26 (2003) and by this Court in *Goodwin v. Landquest Development, LLC* 414 S.C. 623, 779 S.E. 2d 826 (Ct. App. 2015). Here, however, they were ignored.

The Notes expressly provide that Rule 40(j), SCRCP "substantially revises the procedure for dismissing a case" previously contained in former Rule 40(c)(3), SCRCP. The Notes further explain that when an action is restored following a Rule 40(j), SCRCP dismissal, it "proceeds as a newly filed action on the General Docket." Finally, and most relevantly the Notes specifically cite to Rule 41, SCRCP and state that "[a] case can also be dismissed voluntarily under Rule 41(a)." These statements demonstrate that the drafters viewed Rule 40(j), SCRCP as part of the broader framework governing voluntary dismissals rather than as an isolated procedural device immune from the policies reflected in Rule 41, SCRCP. Those Notes reveal the drafters understood Rule 40(j) to be one component of a unified procedural framework governing voluntary dismissals. The Opinion, however, treats Rule 40(j), SCRCP as if it exists independently of that framework.

This treatment is material because the Reporter's Notes are in direct contravention to the Opinion's conclusion that Rule 40(j), SCRCP exists wholly independent of Rule 41, SCRCP. To the contrary, the Notes expressly describe Rule 40(j), SCRCP as a means of dismissing a matter with built in statute of limitation protections, and immediately cross-reference Rule 41(a), SCRCP. The Reporter's Notes expressly direct practitioners and courts to Rule 41(a), SCRCP confirming that the drafters understood Rule 40(j), SCRCP to exist within the broader framework governing voluntary dismissals.

The Reporter's Notes reflect a legislative purpose of permitting a consensual dismissal while protecting litigants through a one-year tolling provision and a restoration mechanism that

treats the restored matter as newly filed. Nothing in the Rule or the Notes suggests that a plaintiff may repeatedly dismiss and restore the same action indefinitely, thereby avoiding the finality principles embodied elsewhere in the Rules of Civil Procedure.

The Opinion also overlooks the practical consequences of the interpretation it adopts. Under the Court's construction, a plaintiff may repeatedly invoke Rule 40(j), SCRCPP restore the action, dismiss it again, restore it yet again, and continue this cycle indefinitely. Such a construction permits perpetual litigation of the same claim notwithstanding repeated voluntary dismissals. That interpretation conflicts with the well-recognized policy favoring finality of litigation and creates an avenue by which a litigant may indefinitely suspend and revive an action while avoiding the limitations imposed by Rule 41, SCRCPP. That interpretation does not follow the law.

5. The words of the Rule have to be given their plain meaning.

Appellants argued that the plain language of Rule 40(j), SCRCPP, particularly the words "one time," have meaning throughout the Rule and permit only a single dismissal and restoration. And if those words are given their plain meaning, then there are consequences if the Rule is invoked multiple times.

Respondents did not address that textual argument, the principles governing construction of court rules, or Appellants' collateral estoppel argument. Likewise, the Opinion does not address Appellants' textual analysis or acknowledge that Respondents elected not to contest it. Rather, the Court when addressing the issue made a one-line notation: "the rule states that the party may strike its complaint 'one time as a matter of right.'" (Op. p. 6). Because Rule 221 exists to permit

reconsideration of issues overlooked or misapprehended, rehearing is appropriate to address the construction of Rule 40(j), SCRCP actually presented by Appellants. The language in the Rule has meaning beyond the Opinion's limited application.

6. The Opinion conflicts with Goodwin's construction of Rule 40(j), SCRCP.

The Opinion's construction of Rule 40(j), SCRCP is inapposite with this Court's decision in *Goodwin*. Although the Opinion cites *Goodwin*, it does so outside of its direct analysis of Rule 40(j), SCRCP. Instead, it references *Goodwin* when dealing with the claim for malicious prosecution thereby deflecting from any reasoning that supports how its present interpretation of Rule 40(j) may be impacted.

The court in *Goodwin* recognized that striking a case pursuant to Rule 40(j), SCRCP, is not merely an administrative act of placing a matter at the foot of the calendar. *Id.* 414 S.C. 623. Rather, the Court expressly characterized the rule as providing for dismissal and as a voluntary dismissal because it requires the written consent of all adverse parties. *Id.* at 631. The *Goodwin* court analyzed the Rule and its legal effect by looking to the language of the rule and within the broader procedural framework governing civil actions. The *Goodwin* court referenced and looked specifically to the Reporter's Note of Rule 40(j), SCRCP. The *Goodwin* court further referenced and consider multiple rules of Civil Procedure including Rules 41(b) (*Id.* at 633), 79(f) (*Id.* at 635), 84 (*Id.* at 635), and 86(a), SCRCP (*Id.* at 631)

Unlike *Goodwin*, the Opinion reasons that Rule 40(j), SCRP has no limitations. The Opinion reasons 40(j), SCRCP, does not expressly prohibit multiple dismissals, and the language "one time" is not a limitation on repeated dismissals or restorations. The practical consequences under the Opinion's construction, is that a plaintiff could:

- file a foreclosure action;
- voluntarily dismiss it under Rule 40(j);
- restore the action years later;
- voluntarily dismiss it again;
- restore it again;
- repeat this cycle indefinitely; and
- if restoration became problematic, simply commence an entirely new foreclosure action based upon the identical alleged default.

Nothing in *Goodwin* suggests that Rule 40(j), SCRP was intended to authorize perpetual litigation through unlimited cycles of dismissal and restoration. To the contrary, *Goodwin* recognizes that Rule 40(j), SCRPC dismissals have genuine procedural significance with regard to the timing of restoration of an action on the application of the statute of limitations. Ignoring the premise recognized in *Goodwin*, the Opinion finds Rule 40(j), SCRPC limitless.

Moreover, the Opinion's construction effectively renders portions of the Reporter's Notes meaningless. The Notes explain that restoration returns the matter to the General Docket where it proceeds "as a newly filed action." The Notes further observe that "[a] case can also be dismissed voluntarily under Rule 41(a)." This cross-reference demonstrates that the drafters viewed Rule 40(j) and Rule 41(a) as complementary procedural mechanisms governing voluntary dismissals. The Opinion ignores the Notes and gives no explanation why the drafters would expressly connect the two rules if they were intended to operate in complete isolation from one another.

Appellants respectfully submit that the Court has overlooked the analytical consequence of its own precedent. Either *Goodwin* means that Rule 40(j), SCRPC dismissals are genuine

voluntary dismissals carrying substantive procedural consequences, or Rule 40(j), SCRPC is merely an administrative docket-management rule that can be exploited with no limitations. *Goodwin* adopted the former understanding. The Opinion, however, reaches a result that effectively depends upon the latter without explaining why *Goodwin* should not control. For these reasons, rehearing is warranted so that the Court may reconcile its Opinion with *Goodwin*, the official Reporter's Notes to Rule 40, SCRPC and the settled principles requiring procedural rules governing the same subject matter to be construed harmoniously.

7. The opinion is not only an outlier from South Carolina authority but also from authority cited by Appellants from other jurisdictions.

Although South Carolina's Rules of Civil Procedure differ from other state's procedural rules, the majority of jurisdictions addressing repeated dismissals have recognized that eventually there must be procedural finality. Appellants drew several of these decisions to the Court's attention.

A number of other jurisdictions that have uniformly rejected perpetual re-filing of foreclosure actions after repeated voluntary dismissals, include:

- the Illinois decision involving Deutsche itself in the case of *Deutsche Bank Trust Company Americans, as Trustee for the Trust Known as Residential Accredited Loans Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2006-QS15, vs. Eyal M. Sigler*, 169 N.E. 3d 759, 446 Ill. Dec. 96 (Il. App (1st) 2020) *Sigler*;
- Indiana's decision in *Mannion v. Wilmington Savings Fund Society FSB*, 133 N.E. 3d 240 (2019); and,
- Ohio's decision in *G U.S. Bank, N.A. vs. Gullotta*, 120 Ohio St. 3d 399, 2008-Ohio-6268, 899 N.E. 2d 937 (2008).

Admittedly these cases have no binding impact on this Court. However, the cases were

drawn to the Court's attention by Appellants because of their similarity in circumstances. They deserved at least a passing mention that they were considered and rejected rather than be completely ignored. For this reason and all others raised above, Appellants respectfully request that the Court grant rehearing, withdraw its Opinion, and issue a substituted opinion that appropriately addresses all issues.

II. RESPONENTS REFUSAL TO RESPOND TO DISCOVERY PRESUMES PREJUDICE.

Appropriately noted in the Opinion is that parties in litigation have an affirmative duty to answer interrogatories and respond to request to produce. (Op. p. 16, *citing CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E. 2d 877 (2011)). Ignored however is Appellants' position that Respondents' open and bold refusal to answer discovery is prejudicial.

The Opinion's reliance on *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E. 2d 877 (2011) is interesting in light of its failure to recognize material distinctions between the matters. In *CFRE*, the trial court (ALJ) required the offending party (the Assessor) to produce various documents. The Assessor complied with order and the documents produced were made a part of the record. The distinction here is Respondents have not named who it intends to bring to trial to prove its case. Respondents have provided nothing.

Additionally, the Opinion fails to address the prejudice claimed by Appellants. Appellants, as in *CFRE*, cite to *Downey v. Dixon*, 294 S.C. 42, 362 S.E. 2d 317 (Ct. App. 1987) for the proposition that "prejudice must be presumed and, *unless the party who has failed to submit to discovery can show lack of prejudice*, reversal is required." *Id.* at 46, 362 S.E.2d at 319 (emphasis added). In *CFRE*, *CFRE* conceded that there was nothing more the Assessor could produce that would be of any consequence. The opposite exists here. With the discovery time period having

expired under the Scheduling Order, Appellants have no idea who will be testifying on behalf of Deutsche or Nationstar. They have no ability to know what the substance of testimony will be. They have been deprived of the opportunity to investigate the potential witness(s). All of which they assert is highly prejudicial. Respondents have failed to show a lack of prejudice. Thus, under *CFRE* and *Downey*, reversal was and is required.

The suggestion in the Opinion that additional motions can be filed does not address the matter on appeal and frankly only creates additional issues. If the matter returns to the lower court and Appellants file another motion to compel, the lower court could deny it on the potential grounds it has already been heard and denied and is now the law of the case. If Appellants file a motion to exclude any witness identified on the eve of trial, that also could be denied by the lower court based on this Court's Opinion not to require a party to meet its duties. The Opinion, in essence, creates a possible scenario that Appellants will be forced to proceed to trial not knowing who witnesses will be or afforded an opportunity to prepare for trial. That defies the concept that lawsuits should be decided on what facts are revealed, not by what facts are concealed. *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001)

The Opinion provides empowerment for concealing facts and not properly engaging in discovery. Furthermore, the Opinion very well could serve as confusion for the bench and bar as to whether trial by surprise is a reinvigorated reality.

III. THE OPINION, WHEN VIEWED AS A WHOLE, DEPARTS FROM THE ESTABLISHED SUMMARY JUDGMENT STANDARD BY RESOLVING DISPUTED FACTUAL INFERENCES, RATHER THAN DETERMINING WHETHER GENUINE ISSUES OF MATERIAL FACT EXISTED.

Summary judgment requires that all evidence and every reasonable inference 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). In opposition to Respondents' motions for summary judgment, Appellants presented evidence supporting differing reasonable inferences concerning Appellants' defenses and

counterclaims including but not limited to the authority to enforce the indebtedness, the legal significance of repeated Rule 40(j), SCRCF dismissals, the effect of acceleration, Respondents' purpose in repeatedly invoking judicial process, the accuracy of the indebtedness asserted, and the legal consequences of years of procedural inactivity. Rather than determine whether those competing inferences created genuine issues of material fact in the light most favorable to the non-moving party, the Opinion repeatedly resolves disputed factual questions and competing inferences in favor of Respondents, rather than applying the well-settled standard governing summary judgment. This exceeds any court's function in determining whether triable issues of act exist.

A. Genuine Issues of Fact Exist as to Respondents' Abuse of Process Claim.

Appellants presented evidence and allegations concerning repeated dismissals and restorations pursuant to Rule 40(j), SCRCF; years of procedural inactivity; continued accrual of indebtedness during periods in which the litigation remained dormant; continued servicing conduct directed toward Appellants; representations concerning the ownership and enforcement of the debt; and the filing of a subsequent foreclosure action after years of refileing the same action. Appellants asserted facts that were continuing over a protracted period of time and which were outside the confines of the foreclosure proceedings which they assert cumulatively rise to a level of abuse of process. Appellants did not take the position, as the Opinion appears to indicate, that that the mere filing of foreclosure proceedings by Respondents establishes abuse of process.

The abuse alleged was not an isolated event or single dismissal, restoration, filing, substitution or filing. It was the combined use of multiple mechanisms over an extended period of time to prolong litigation, to fail to prosecute litigation, to increase indebtedness and further impair

property and ultimately abandon an action filed repeatedly to pursue the same default under a fourth action.

Viewed in the light most favorable to Appellants—as required on summary judgment—the evidence presented and of record sufficiently establishes issues resulting in differing reasonable inferences regarding Respondents' purpose in repeatedly invoking judicial process. The Opinion, however, appears to resolve those competing inferences in Respondents' favor rather than determining only whether genuine issues of material fact existed. That is inconsistent with the summary judgment standard and with the requirement that all reasonable inferences be drawn in favor of the non-moving party. Summary judgment should be reversed.

B. A Declaratory Judgment Action is not Just an Offensive Cause of Action.

The Opinion concludes, in essence, the counterclaim for declaratory judgment is not necessary because issues raised can be raised in defense to the foreclosure action. (Op. p. 14) This is not the proper standard to determine if declaratory relief is available.

Rule 57 of the South Carolina Rules of Civil Procedure governs declaratory judgment actions, and expressly provides: "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate..." *Smith v. South Carolina Retirement Systems*, 336 S.C. 505, 520 S.E. 2d 339 (Ct. App. 1999). "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).

Contrary to the Opinion's conclusion, Appellants by asserting a counterclaim are not asking the trial court to adjudicate its defenses prior to the adjudication of the foreclosure claim. Nor have Appellants asked that the issues be determined in a separate action as is being suggested by the statement "Deutsche and Nationstar's conduct can be or have been litigated in this current action." (Op. p. 14) The Appellants have merely asked for the court to adjudicate broader justiciable issues than those raised in the foreclosure at the same time the foreclosure matter is tried. The conclusions made in the Opinion overlook the continuing controversy between the parties and the independent purpose served by declaratory judgments.

C. A Dismissal with Preclusive Effect is a Determination in Ones Favor.

The Opinion creates several points of confusion while addressing the counterclaim for malicious prosecution. First the Opinion states "[w]e interpret *Goodwin* to say that a case stricken pursuant to Rule 40(j) is functionally equivalent to a dismissal because it removes the case from the active trial roster." This clearly confuses Rule 40(j), SCRPC with the former Rule 40(c)(3), SCRPC which Rule 40(j), SCRPC substantially revised. Additionally, if *Goodwin* is only the functional equivalent, then why did *Goodwin* consider the tolling provisions, the Report's Notes and the impact of dismissal?

Additionally, it is contradictory in one sentence to say the Rule is the functional equivalent to a dismissal and then in the next sentence to remark "if *Goodwin* is interpreted to mean that a Rule 40(j) is a dismissal..." (Op. p. 9) These statements appear to be two opposing concepts.

For all the reasons stated above a Rule 40(j), SCRCF stipulation or order is a dismissal. And when Rule 40(j), SCRCF is employed multiple times it is an adjudication on the merits. An adjudication on the merits is a favorable decision supporting malicious prosecution.

D. The Opinion Fails to Consider the Facts in the Light Most Favorable to the Non-moving Party as to Negligent Misrepresentation, Unfair Trade Practices and the Statute of Limitations.

The Opinion narrows the factual allegations considered at summary judgment in a manner inconsistent with the requirement that evidence be viewed collectively and, in the light, most favorable to the nonmoving party. As to negligent misrepresentation, unfair trade practices and statute of limitations, Appellants allege and argue repeated servicing representations, conflicting representations regarding ownership or the lack thereof, conflicting representations regarding authority or the lack thereof, representations regarding reinstatement and modification and representations made throughout the years of litigation and after this present action was commenced. Consistently the Opinion ignored these arguments and factual disputes. The proper standard for summary judgment was not applied and the Opinion should be withdrawn.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court grant rehearing, reconsider its analysis of Rule 40(j), SCRCF, the failure to respond to discovery and unresolved discovery issue, and grant such further relief as the Court deems just and proper.

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COURT OF COMMON PLEAS

THE HONORABLE KRISTI F. CURTIS, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2023-001844

CASE NO. 2019-CP-10-4503

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

Of Whom Curtis Rogers, Julie Rogers and Ashley Johnson Beshara Trustee
of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd
day of March 2020 are Appellants,

v.

Nationstar Mortgage LLC, Respondent.

PROOF OF SERVICE

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I, Mary Arnold, attorney for Appellants Rogers, hereby certify that Appellants' **PETITION FOR REHEARING** was served on Respondents and Appellant Beshara on July 6, 2026, by emailing (see attached email) a copy of the same to all counsel of record:

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Respectfully submitted,

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Subject: RE: Deutsche Bank v. Ashley Beshara (2023-001844)
Date: Monday, July 6, 2026 6:19:00 PM
Attachments: [Petition for Rehearing.pdf](#)

Please find attached Appellants Petition for Reconsideration.

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