

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FROM THE SOUTH CAROLINA COURT OF APPEALS
Appeal From Charleston County
The Honorable Kristi F. Curtis
Circuit Court Judge

RECEIVED

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SC Court of Appeals

Unpublished Opinion No. 2026-UP-277
Heard May 6, 2026 – Filed June 3, 2026
Withdrawn, Substituted, and Refiled August 19, 2026
Appellate Case No.: 2023-001844
Civil 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 WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a Petition for Rehearing was made and ruled upon by the Court of Appeals on August 19, 2026.

s/Mary Leigh Arnold

Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding in its Substituted Opinion that Rule 40(j), SCRCP, permits a party to repeatedly dismiss and restore the same claim, notwithstanding the Rule's express limitation that a party may strike its claim "one time as a matter of right," and without identifying any procedural or substantive consequences for multiple dismissals?
2. Did the Court of Appeals and trial court err by failing to require Respondents to identify their trial witness(es) in response to Rule 33, SCRCP standard interrogatories despite their continuing discovery duties set forth in Rules 33 and 34, SCRCP, and by failing to address the resulting prejudice to Appellants?
3. Did the Court of Appeals err by concluding a declaratory judgment counterclaim cannot be maintained because the issues raised could also be asserted as defenses to the foreclosure action, where the existence of another adequate remedy does not preclude declaratory relief, and the Declaratory Judgments Act authorizes affirmative and negative declarations concerning rights and legal relations under written instruments.
4. Did the Court of Appeals err in holding that Rule 40(j), SCRCP dismissals entered pursuant to the parties' agreement and form court orders cannot constitute a favorable termination for purposes of malicious prosecution merely because the dismissals were embedded in court orders, where 40(j) requires the parties' agreement and *Goodwin v. Landquest Development, LLC*, 414 S.C. 623, 779 S.E. 2d 826 (Ct. App. 2015), recognizes Rule 40(j) as a voluntary dismissal with substantive procedural consequences?
5. Did the Court of Appeals and trial court err by resolving disputed factual inferences against Appellants on summary judgment, rather than viewing the evidence and all reasonable inferences in the light most favorable to Appellants as required by Rule 56, SCRCP?

INTRODUCTION

This case presents several issues, one of which is both novel and unresolved involving the operation and construction of Rule 40(j), SCRCP. The Court of Appeals determined that a plaintiff may repeatedly invoke Rule 40(j), SCRCP, to voluntarily dismiss and later restore the same civil action, indefinitely and without any substantive consequences, notwithstanding the Rule's express limitation that a party may strike a complaint "one time as a matter of right." It also made that determination without properly considering the relationship between Rule 40(j) and Rule 41, SCRCP, the official Reporter's Notes to Rule 40(j), SCRCP and its prior holding in *Goodwin v. Landquest Development, LLC*, 414 S.C. 623, 779 S.E. 2d 826 (Ct. App. 2015) that a Rule 40(j), SCRCP strike constitutes a dismissal with substantive procedural consequences. Instead, here it found that a Rule 40(j), SCRCP is "functionally equivalent" to a dismissal with no consequences.

Because Rule 40(j), SCRCP is used throughout South Carolina civil litigation, including foreclosure matters, the issue is not case specific. The Court of Appeals' construction permits a plaintiff to commence an action, voluntarily dismiss it, restore it, dismiss it again, restore it again, and repeat the process without an apparent endpoint or consequence. In essence, the Court of Appeals has determined that a litigant may avoid principles of finality embedded in the Rules of Civil Procedure and jurisprudence by invoking Rule 40(j), SCRCP.

The Court of Appeals' construction creates tension within the Rules of Civil Procedure. The official Reporter's Notes to Rule 40(j), SCRCP expressly refer to Rule 41(a), SCRCP. Rule 41, SCRCP expressly addresses dismissals and contains consequences for repeated dismissals. Rule 41(b), SCRCP provides "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for under this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19,

operate as an adjudication on the merits.” The Court of Appeals nevertheless ignored this language and the Rule’s cross-reference and treated Rules 40(j) and 41, SCRCP as separate and unrelated procedural devices with no bearing upon the other. The Court of Appeals ignored that Rule 41, SCRCP confirms South Carolina’s procedural system recognizes substantive consequences from repeated dismissals. This construction presents a novel and important question of South Carolina procedural law appropriate for resolution by this Court.

Likewise, the Court of Appeals decision not to require a party to respond to standard interrogatories contained within the Rules of Civil Procedure, is tantamount to the adoption of the concept that trial by surprise or ambush is acceptable. This Court should grant certiorari to determine if it is acceptable to require a litigant to go to trial without being provided the name of the adverse party’s witnesses despite request and a motion to compel.

STATEMENT OF THE CASE

Curt Rogers executed a Promissory Note in favor of Homecomings Financial, LLC on January 12, 2007. (R. Vol I p. 81) On the same day Curt and Julie Rogers (collectively “Rogerses”) executed a Mortgage encumbering their primary residence in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Homecomings Financial, LLC. (R. Vol I pp. 82-83)

Aurora Loan Services, LLC (“ALS”) claiming to be the assignee of the Rogerses’ mortgage filed a foreclosure action on September 15, 2009. (R. Vol I pp. 81-85) The case was given Civil Action No. 2009-CP-10-5840. (“2009 Action”) ALS elected to and did “declare the entire balance of said indebtedness due and payable...” (R. Vol I p. 84) On October 23, 2009, the Rogerses filed an Answer. (R. Vol I pp.87-90) On March 9, 2010, the 2009 Action was voluntarily dismissed by ALS pursuant to Rule 40(j), SCRCP. (R. Vol I pp. 28-30) The dismissal was signed by Plaintiff’s counsel but not any other Defendant or their counsel.

On March 10, 2011, two years later, the matter was restored at the request of ALS and given Civil Action No. 2011-CP-10-1805. (“2011 Action”) (R. Vol I p. 78) The Complaint filed in the 2009 Action was the operative Complaint for the 2011 Action. After motion, the Rogerses filed an Amended Answer and Counterclaim on February 13, 2012. (R. Vol I pp. 91-103). On June 14, 2013 an Order of Substitution was filed substituting Nationstar Mortgage LLC for ALS, the new loan servicer or assignee. (R. Vol I p. 45) On March 4, 2014, the Rogerses filed a Motion for Summary Judgment. (R. Vol I pp. 120-121) Shortly thereafter, on June 24, 2014, the case again was dismissed by consent Order signed by the parties pursuant to Rule 40(j), SCRCF. (R. Vol I, pp. 32-34) Separately, a Form 4 Order was filed. (R. Vol I p. 34) The Form 4 Order is marked noting the case is ended.

On April 7, 2015, without motion an Order restoring the 2011 Action was filed. (R. Vol I p. 35) The third action was given the new civil action number: Civil Action No. 2015-CP-10-1971. (“2015 Action”). The 2015 Action Complaint was the same as the Complaint in the 2009 Action and 2011 Action. On May 12, 2016 a Notice of Case Roster was sent notifying the parties the case was on the jury roster for the week of May 16, 2016. (R. Vol. II p. 378) Shortly thereafter the third voluntary dismissal of the case occurred. (R, Vol I p. 38) Unlike the 2011 Action, there was no order signed by all parties. Only a Form 4 Order was entered ending the matter on May 16, 2016. (R. Vol I p. 38) The Form 4 marked the case as ended.

On August 27, 2019, this action, the fourth foreclosure action, was filed relating to the Rogerses’ Note and Mortgage. (R. Vol I pp. 104-113) The fourth foreclosure was initiated by Deutsche Bank and Trusted Company Americas, as Trustee for Residential Accredited Loans, Inc., Pass-Through Certificates 2007-QH2. Undisputed is the fact that the note and mortgage that are

identified in Paragraphs 7 and 8 of the fourth action are the same note and mortgage that were the subject matter of the 2009 Action, 2011 Action and the 2015 Action. (R. Vol II pp 242-253)

On October 18, 2019 Beshara filed a Motion to Dismiss¹ (R. Vol I p. 131-140) that was denied on June 20, 2020. On June 12, 2020 the Rogerses filed a Motion to Intervene that was granted on June 28, 2020. (R. Vol I p. 50) On July 7, 2020 Beshara filed an Answer and Counterclaim which was amended on July 15, 2020 adding Nationstar as a third-party defendant. (R. Vol I pp. 148-169) On August 13, 2020, the Rogerses filed an Answer, Counterclaim and Crossclaim. (R. Vol I pp 170-191)

On September 7, 2022, the Rogerses filed a Motion to Compel and for Sanctions against Deutsche and Nationstar as to their joint discovery responses. (R. Vol I pp. 220-225) The Rogerses specifically sought to have the name(s) of the witness(es) that would appear and testify at trial on their behalf. On September 8, 2022 the Rogerses filed a Motion for Summary Judgment. (R. Vol II pp. 240-254) October 7, 2022, Deutsche and Nationstar filed a Motion for Partial Summary Judgment as to both Beshara and the Rogerses (R. Vol III pp. 526-527) followed by an Amended Motion for Partial Summary Judgment on October 10, 2022. (R. Vol III pp. 528-529) The motions came for hearing on February 2, 2023.

On July 10, 2023 an *Order Denying Defendants Motion for Summary Judgment, Granting Plaintiff and Third-Party Motion for Summary Judgment and Granting, In Part, Defendants' Motion to Compel* was entered. (R. Vol I pp. 1-23). On July 20, 2023, both the Rogerses and Beshara filed a Notice of Motion and Motion to Reconsider. (R. Vol II - III pp. 459-504) The Motions for Reconsideration were denied on November 1, 2023. (R. Vol I p. 25)

¹ Beshara's motion sought dismissal, in part, on the prior dismissals under Rule 40(j), SCRCP.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

I. THE CONSTRUCTION OF RULE 40(j), SCRPC PRESENTS A NOVEL AND CRITICAL QUESTION OF SOUTH CAROLINA PROCEDURAL LAW.

The Court of Appeals and trial court's determination that the repeated voluntary dismissals under Rule 40(j), SCRPC in a foreclosure action arising from the same alleged default to dismiss can continue indefinitely without the finality consequences applicable to repeated dismissals under the Rules of Civil Procedure is flawed in a number of ways.

A. Titles to the Rules of Civil Procedure are not controlling and should not have been given undue importance.

The Court of Appeals recited to the titles to Rule 40(j) and Rule 41, SCRPC. The Court noted that "Rule 40 is titled 'General Docket, Trial Rosters, and Call of Cases for Trial'" and that "Rule 41 is titled 'Dismissal of Actions, Non-Suit.'" (Op. p. 5). The Court's focus on the titles is misplaced; the language of the Rules control.

Statutory rules of construction may be applied to the construction of court rules. *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26 (2003), and *Rollins v. Wunda Weve Carpet, Co.*, 255 S.C. 1, 177 S.E. 2d 5 (1970). Titles to the Rules of Civil Procedure or statutes do not control, they are only used when they shed light on some ambiguous word or phrase and they cannot undo or limit what the text makes plain. *Garner v Houck*, 312 S.C. 481, 435 S.E. 2d 847 (1993)(reversal of the Court of Appeals use of the heading of Rule 3(b), SCRPC to limit the rule because it created ambiguities in its construction.)

The Court of Appeals erred by using the title to Rule 40, SCRPC to construe the language of the Rule. It also erred by suggesting the marking of a cover sheet where Rule 40(j), SCRPC is referenced impacts the meaning of the Rule. The Court of Appeals did not address where the cover sheet was marked indicating the case was ended.

Rule 40(j), SCRCP ends a case. The case does not remain on any docket. It is removed from all dockets whether it is a trial docket or general docket. Using the titles to the Rules to construe the meaning of text in contrast to the language of the Rule was error.

B. The Court of Appeals erred in its construction of Rule 40(j), SCRCP by failing to follow the cardinal rule of statutory construction that the words must be given their plain and ordinary meaning.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *Joint Legislative Comm. v. Huff*, 320 S.C. 241, 464 S. E. 2d 324 (1995). Legislative intent prevails when it can be reasonably be discovered in the language used construed in light of its intended purpose. *Glover by Cauthen v. Suitt Constr. Co.* 318 S.C. 465, 459 S. E. 2d 535 (1995). A statute's words must be construed in context and in light of the intended purpose of the statute and in harmony with its subject matter. *In re Manigo*, 398 S.C. 149, 157, 728 S.E. 2d 32, 26 (2012).

Rule 40(j), SCRCP provides, in part:

“A party may strike its complaint, counterclaim, cross-claim, or third-party claim from any docket one time as a matter of right...”

This portion of the Rule contains a numerical limitation. “One time” has meaning and is significant. The Court did give limited recognition to the words by stating there exists nothing in the Rule that indicates “that a party is allowed only one dismissal under the rule...” (Op. p. 5)² However, the Court declined to give the words operative significance beyond the first strike. The Court's opinion leaves the lower courts and litigants wondering what “one time as a matter of

² Here the Court of Appeals says a Rule 40(j) is a dismissal but later states a Rule 40(j) is the “functional equivalent to a dismissal...” (Op. p. 8)

right” means if a party can do the exact same thing after restoration. Does the Rule allow indefinite strikes or at least three (3) as in this matter?

Under the Court’s interpretation, the practical effect is to eviscerate the one-time limitation. Under the Court’s construction a litigant can dismiss the action once, restore it, and then dismiss it again, and continue the cycle indefinitely. Nothing in the Rule’s text supports that construction. That construction creates an irregularity in contradiction to the rules of construction. The unresolved issue of what happens after the one authorized dismissal under Rule 40(j), SCRCPP requires this Court’s attention and resolution.

C. The Court of Appeals’ decision here is not reconcilable with *Goodwin*.

In *Goodwin v. Landquest Development, LLC* 414 S.C 623, 779 S.E. 2d 826 (Ct. App. 2015), the Court of Appeals in contrast to this matter, recognized that “a case stricken pursuant to the rule as the equivalent of dismissed.” *Id.* at 631. It also analyzed the Rule by reference to its procedural consequences and noted there would be no necessity for a tolling period if striking were not a dismissal. *Id.* at 631. It specifically took into consideration the 1994 Official Notes.

In this matter, the Court of Appeals acknowledged *Goodwin* but limited its significance by characterizing a Rule 40(j), SCRCPP striking as merely the “functionally equivalent to a dismissal because it removes a case from the active trial roster.” (Op. p. 8) What the consequences are of “functionally equivalent” is unknown. Additionally, reference to an “active trial docket” causes confusion because all trial dockets are active. The decision below could be interpreted to mean a case converts to the general docket from the “active trial roster” and is not stricken at all. That construction is inconsistent with the text of the Rule.

The Court then stated that even if *Goodwin* meant that a Rule 40(j) striking was a dismissal, it still was not a favorable termination because it was not an adjudication on the merits. (Op. p. 6) That determination raises a central problem.

If Rule 40(j) is a dismissal with meaningful procedural consequences, then the Court must determine what those consequences are when the Rule is invoked repeatedly. *Goodwin* considered the language of Rule 40(j), SCRCP its tolling provision, the Reporter's Notes, and other provisions of the Rules of Civil Procedure. Appellants expressly identified these points in their Petition for Rehearing but the Court of Appeals ignored it. The question therefore is not merely whether the Court of Appeals disagrees with Appellants. It is whether the decision below has correctly reconciled its interpretation of Rule 40(j), SCRCP with existing South Carolina authority. That question warrants this Court's review.

D. The Court of Appeals failed to harmonize Rule 40(j), SCRCP with other Rules of Civil Procedure or consider the Official Reporter's Notes.

The voluntary dismissal under Rule 40(j), SCRCP must be construed together with other rules of the same or similar subject matter. *See Eagle Container Co. v. County of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008)("[t]he language must also be read in a sense [that] harmonizes with its subject matter and accords with its general purpose."); *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.”) This is done so that Rules addressing the same subject matter are construed together to produce a coherent and harmonious procedural system.

Harmonizing the Rules of Civil Procedure requires more than examining one provision in isolation. Both Rule 40(j) and Rule 41, SCRCP regulate dismissals, which is basically acknowledged by the Court of Appeals. The difference in the titles does not alter their subject matter or general purpose.

Rule 40(j), SCRCP creates a procedural mechanism by which a party may voluntarily dismiss a claim. It provides a party may strike one time as a matter of right; the voluntary dismissal must be agreed in writing and specifically by adverse parties; the agreement carries a specific tolling consequence; restoration is permitted by motion but not necessarily required within a year; and once restored, the case proceeds as a newly filed case.

The 1994 Reporter’s Notes specifically provide that Rule 40(j), SCRCP "substantially revises the procedure for *dismissing* a case" and expressly directs the reader to Rule 41(a), SCRCP as another method of voluntary dismissal. The Notes further state “Rule 40(j) now requires all adverse parties to consent to the *dismissal* in writing.” A matter restored after motion "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)."

The word dismiss is used three (3) separate times in the Notes. The word’s usage and the statements demonstrate that the drafters viewed Rule 40(j), SCRCP, as part of the broader framework governing dismissals rather than as an isolated procedural device immune from the policies reflected in Rule 41, SCRCP. The 1994 Notes reveal the drafters understood Rule 40(j)

SCRCP, to be one component of a unified procedural framework governing voluntary dismissals. The Opinion, however, ignores the Notes and treats Rule 40(j), SCRCP as if it exists independently of that framework.

The Court of Appeals ignored the Official Notes in construing Rule 40(j), SCRCP unlike this Court when it specifically considered the notes in addressing the restoration provisions of the Rule in *Maxwell v. Genez*, 356 S.C. 617, 591 S. E. 2d 26 (2003). And unlike what the Court of Appeals did in *Goodwin* when addressing the tolling provisions found in Rule 40(j), SCRCP.

Rule 40(j), SCRCP by its language is a method of voluntary termination of a case which operates within the broader procedural framework governing dismissals. The question is what legal consequences follow when a litigant exhausts the Rule's "one-time" entitlement and dismisses or strikes the case multiple times thereafter. This, along with the lack of harmonization of the Rules and failure to consider the 1994 Official Notes, are reasons that precisely support why this Court should review the decision.

E. The Decision Below Creates a Rule Under Which Civil Litigation Can Continue Indefinitely Without Finality.

The practical consequences of the Court of Appeals' decision here are substantial. Under the Court of Appeals' interpretation, a plaintiff may:

- commence an action;
- strike the action pursuant to Rule 40(j);
- restore the action;
- strike the action again;
- restore it again;
- repeat the process;
- and, if necessary, commence another action based upon the same underlying claim.

Nothing in the decision identifies a procedural point at which finality occurs. In fact, it could be interpreted to mean there is no limitation to repeated use of Rule 40(j), SCRCP. That is particularly troubling because it is contrary to the principle that litigation must have finality.

The record in this case demonstrates the problem. The foreclosure litigation began in 2009. The action was stricken several times when it appeared on a trial calendar. The last dismissal was in 2016, and a new foreclosure action was commenced in 2019. The Rules of Civil Procedure should not be interpreted to create a mechanism by which a litigant can indefinitely suspend litigation and later revive it without consequence. The principle of finality is not a technicality. It protects courts, litigants, property interests, witnesses, evidence, and the integrity of the judicial process. This case provides an appropriate vehicle for this Court to establish the limits of Rule 40(j), SCRCP.

F. The Decision Below Although Unpublished Could Have Significant Statewide Consequences.

The Rule 40(j), SCRCP question is not confined to this matter. Rule 40(j), SCRCP is used throughout South Carolina civil litigation. The Court of Appeals' construction establishes a rule applicable to every civil action in which parties repeatedly use Rule 40(j). The question therefore affects:

- foreclosure actions;
- contract litigation;
- commercial litigation;
- tort actions;
- probate matters;
- construction litigation; and
- other civil actions in which parties employ Rule 40(j) to remove cases from the general docket.

The Court of Appeals' decision creates a procedural mechanism for potentially perpetual litigation and the opportunity for inconsistent trial-court practice. Trial courts will be faced with determining whether repeated Rule 40(j), SCRPC dismissals have any cumulative consequence which could result in varying consequences.

This Court should determine whether that is what Rule 40(j), SCRPC permits. The issue is especially appropriate for Supreme Court review because the answer requires authoritative interpretation of the South Carolina Rules of Civil Procedure and the relationship between Rules 40(j) and 41, SCRPC. This Court is uniquely positioned to answer those questions. The Court should therefore grant certiorari and provide an authoritative construction of Rule 40(j), SCRPC.

II. THE REFUSAL TO REQUIRE A PLAINTIFF TO DISCLOSE ITS WITNESSES WILL CAST DOUBT UPON THE LOWER COURTS' OBLIGATION TO ENFORCE THE RULES AND LITIGANTS' OBLIGATION TO FOLLOW THE RULES RELATING TO DISCOVERY.

The Court of Appeals recognized that parties have an affirmative and continuing duty to respond to discovery, including interrogatories concerning trial witnesses. *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E. 2d 877 (2011). The Court nevertheless left the Rogerses without information concerning or knowing the witnesses Respondents intended to use at trial. In fact, the Court of Appeals appears to reopen the door to the practice of trial by surprise or ambush.

The entire thrust of our discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). The purpose of discovery is to provide the opportunity for full and fair disclosure and to give the trial attorney the means to prepare for the trial. When the rights to discovery are impeded or not given, prejudice to the trial lawyers means to prepare for

trial must be presumed. *Id.* at 217. Additionally, “[u]nless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required.” *Id.* at 217, *citing, Downe v. Dixon*, 294 S.C. 42, 362 S.E. 2d 317 (Ct. App. 1987).

The Respondents failed to respond to Rule 33, SCRPC standard interrogatories and refused to name their witness. The Rogerses appropriately filed a motion to compel asserting Respondents had failed to provide information concerning who would testify and that the discovery period had expired. The Petition for Rehearing explained the resulting prejudice: The Rogerses could not investigate potential witnesses, depose them, or prepare to challenge their testimony. The Court of Appeals reasoned that additional discovery motions could be filed later. That does not cure the problem but rather compounds it.

The suggestion in the Substituted Opinion that additional motions can be filed does not address the matter on appeal and instead creates additional procedural uncertainty. If the matter returns to the lower court and the Rogerses 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 the Rogerses file a motion to exclude any witness identified on the eve of trial, that also could be denied by the lower court based on the Court of Appeals’ Opinion not to require a party to meet its duties. The Opinion, in essence, creates a possible scenario that the Rogerses 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 effectively permits the withholding of information necessary for the opposing party to prepare for trial. Furthermore, the Opinion very well could serve as confusion for the bench and bar as to whether trial by surprise or ambush is a reinvigorated reality. The Court of Appeals should have reversed the abuse of discretion by the trial court. Further, if a party is permitted to withhold information necessary to test the opposing party's evidence and then obtain summary judgment on the resulting record, the discovery rules become ineffective. This issue independently warrants review or, at minimum, should be considered in conjunction with the other issues.

III. THE COURT OF APPEALS ERRED BY CREATING LIMITATIONS IN THE DECLARATORY JUDGMENT ACT THAT DO NOT EXIST.

The Court of Appeals held declaratory relief unnecessary because the Rogerses could litigate the same issues as defenses to Respondent's foreclosure action. (Op. p. 13) That reasoning cannot readily be reconciled with the case cited by the Court of Appeals of *Smith v. S.C. Ret. Sys.*, 336 S.C. 505, 527-28, 520 S.E.2d 339, 351 (Ct. App. 1999). In *Smith*, the Court of Appeals noted “Rule 57 of the South Carolina Rules of Civil Procedure governs declaratory actions, and expressly provides: ‘[t]he existence of another adequate remedy does not preclude a judgement for declaratory relief in cases where it is appropriate,’ a court should not exercise such power lightly.” *Id.* at 527. Nor can that reasoning be reconciled with S.C. Code Ann. §§ 15-53-20 and 30, which authorize affirmative or negative declarations concerning parties' rights under written instruments. The relief sought by Respondents – foreclosure - is not “another adequate remedy” or more effective in comparison to the relief sought by the Rogerses.

Moreover, a declaratory counterclaim is affirmative relief; a defense is not. A homeowner defending only against a foreclosure action essentially says: Plaintiff cannot prove its case to

foreclose. Here, the declaratory judgment counterclaim asks the court to determine: “a) Whether Plaintiff is precluded from maintaining this action by Rule 41, SCRCP, and the doctrine of collateral estoppel; b) Whether the interest terms of the Note are legally unconscionable and unenforceable; c) Whether the chain of title of the endorsements of the Note and altercations of the endorsements of the Note provide Plaintiff the legal authority to enforce the Note; d) Whether the chain of title of the assignments of the Mortgage provide Plaintiff the legal authority to enforce the Mortgage; and e) Whether the chain of title of the Mortgage diverged from the chain of title of the Note making the Mortgage legally unenforceable.” (R. Vol I p. 168) The 17 paragraphs of the Complaint do not bring these issues before the Court. (R. Vol I pp. 109-113) A general denial to the Complaint will not bring these issues before the Court. Nor necessarily will the assertion of an affirmative defense set forth in Rule 8(c), SCRCP. However, a declaratory judgment action is a means of bringing these specific issues before the Court. Those do not seek the same relief.

South Carolina's Declaratory Judgments Act specifically contemplates determining questions involving written contracts. S.C. Code Anno. §15-53-30 permits a person interested under a written contract to obtain a determination of “any question of construction or validity” and a declaration of the person's rights or legal relations under it. A promissory note and mortgage are precisely the type of instruments to which that provision naturally applies.

Finally, the case of *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 461 S.E. 2d 820 (1995) does not compel the result reached by the Court of Appeals. *Garris* involved an attempt to circumvent an unexhausted administrative process; the Rogerses here are already parties to the very judicial proceeding in which Respondent asks the court affirmatively to

determine it has a right to foreclose. And contrary to the Court of Appeals suggestion they do not seek a determination on their defenses prior to the adjudication of the foreclosure issue (Op, p. 13); they seek the determination simultaneously with the foreclosure action. Given the lengthy history of successive foreclosure proceedings, the Rogerses' counterclaim seeks something materially different from a defense to the latest foreclosure complaint: a final adjudication of the parties' continuing legal rights that survives the procedural fate of Respondents' particular foreclosure action.

IV. THE MALICIOUS PROSECUTION CLAIM PRESENTS A RELATED QUESTION OF LAW THAT SHOULD BE REVIEWED WITH THE RULE 40(J) ISSUE.

The Court of Appeals held that the Rogerses could not establish favorable termination under their malicious prosecution counterclaim because the Rule 40(j), SCRPC dismissals were not adjudications on the merits. But that conclusion necessarily depends upon the Court's construction of Rule 40(j), SCRPC. If repeated Rule 40(j), SCRPC dismissals ultimately carry preclusive or merits-based consequences, the analysis of favorable termination necessarily changes.

The Court of Appeals recognized that *Goodwin* treats a Rule 40(j) striking as functionally equivalent to a dismissal. It nevertheless concluded that the dismissal could not constitute a favorable termination because it was not merits-based. That creates an important question concerning the interaction between procedural finality and the tort of malicious prosecution. The Court should review that issue together with the Rule 40(j) question rather than leave the derivative question unresolved.

V. THE COURT OF APPEALS IMPROPERLY RESOLVED DISPUTED FACTS INFERENCES ON SUMMARY JUDGMENT.

The Court of Appeals' Substituted Opinion should also be reviewed because its analysis of the substantive claims effectively resolved disputed factual inferences rather than determining whether those disputes created triable issues.

The Rogerses identified evidence concerning:

- repeated Rule 40(j) dismissals and restorations;
- years of inactivity;
- continued servicing activity;
- representations concerning ownership and authority to enforce the debt;
- the calculation and accuracy of the indebtedness;
- representations concerning modifications and reinstatement;
- acceleration;
- the circumstances surrounding repeated foreclosure proceedings; and
- the purpose for repeatedly invoking judicial process.

The Petition for Rehearing specifically argued that these circumstances, considered collectively and in the light most favorable to the Rogerses, created genuine issues of material fact. Summary judgment does not permit a court to choose between competing reasonable inferences. The evidence must be viewed in the light most favorable to the nonmoving party. Summary judgment was inappropriate as to all of the Rogerses' counterclaims.

A. The Abuse of Process Claim Presented a Genuine Issue of Material Fact.

The Court of Appeals' conclusion that the Rogerses failed to establish the required elements as to any counterclaim, was particularly consequential with respect to abuse of process. The Rogerses did not contend that merely filing a foreclosure action constitutes abuse of process. Their theory concerned the cumulative conduct surrounding repeated invocation, abandonment, restoration, and re-filing of foreclosure proceedings over many years. Whether that conduct was undertaken for an improper purpose was, at minimum, a question requiring the evidence to be

considered under the Rule 56, SCRCF standard. The petition for rehearing identified this error specifically. This Court should grant review to ensure that the summary-judgment standard remains a genuine determination of whether factual disputes exist rather than a resolution of competing factual inferences.

B. The Court of Appeals Improperly Converted a Disputed Question of Reliance into a Question of Law.

The Court of Appeals determination that the Rogerses continued contest of the different foreclosure actions for seventeen years, established a lack of reliance. (Op. p. 10) There is no support for this determination.

Parties have a fundamental right to defend against claims asserted against them. The fact that the Rogerses have availed themselves of this right does not categorically result in a lack of reliance. That conclusion is erroneous because it converts the exercise of a party's right to defend itself into evidence negating reliance.

The Court of Appeals determined Appellants' claims for negligent misrepresentation fail as a matter of law because there is no evidence in the record setting forth specific statements that were allegedly false representations. (Op. p. 10) However, the record does contain evidence from which a reasonable factfinder could determine that Respondents made representations to the Rogerses. Curtis Rogers testified as to false or misleading representations that were made. (R. Vol II, pp. 297-299, 318-321) Whether those representations were false, whether reliance was justified, and whether the claimed loss was proximately caused by that reliance are not issues that can be resolved by selecting Respondents' preferred inference on summary judgment.

C. The SCUTPA Claim Presented Genuine Issues Concerning Unfair or Deceptive Conduct.

The Court of Appeals held that legal fees alone are insufficient to support the damages element of a SCUTPA claim relying on the case of *Mull v. Ridgeland Realty, LLC*, 387 S.C., 479, 693 S.E. 2d 27 (Ct. App. 2010). It further found that Appellants limited their damages to incurred legal expenses in defense of the three prior foreclosure actions and the present one. (Op. pp. 10-11) Both of these conclusions are based on error and warrant review.

In *Mull* the Court of Appeals determined that reading S.C. Code Ann. §39-5-140(a) in its entirety leads to the conclusion “actual damage are distinct from attorney fees.” *Id.* at 32. Based upon this the court found categorically attorneys’ fees can never be actual damages. This lacks an appreciation for differing circumstances and the clear established principle that “[a]ctual 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).

Mull involved a default setting where attorneys’ fees were awarded as actual damages and separately as an attorneys’ fee award. The fees awarded were only for the underlying action in *Mull*. Here it is very different from *Mull*. Appellants seek the costs and expenses they incurred for the three (3) prior actions as actual damages and leading up to filing of the within action, exclusive of the cost and expenses incurred in this matter. The situation here is more aligned with the case of *Addy v. Bolton*, 257 S.C. 28, 183 S.E. 2d 708 (1971)(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.) Here attorneys' fees should be recoverable as actual damages.

Additionally, the record reflects Appellants asserted damages well beyond the costs of having to defend three prior actions. Curtis Rogers testified that Respondents' actions and inactions have caused damage to his to his credit worthiness and "inability to do what I do, and this is go out and raise money to – for projects." (R. Vol II p. 303-304, 400-407)

Finally, this very scenario shows the potential repetition. Three prior actions were initiated by Respondents demonstrating the potential for repetition. *See Crary v. Djebelli*, 329 S.C. 385, 496 S.E. 2d 21 (1997) (holding evidence indicating mortgage broker had other opportunities to enter into similar transactions was sufficient evidence to support a finding of a SCUTPA violation); *York v. Conway Ford, Inc.*, 325 S.C. 170, 480 S. E. 2d 726 (1997)(holding allegation of car dealership's alleged misrepresentation of a car's accident history was sufficient to survive directed verdict motion for SCUTPA violation because the dealership was in the business of selling cars; thus, "[c]ertainly the alleged acts or practices have the potential for repetition"). Clearly the three prior actions show potential for repetition.

CONCLUSION

This case presents a novel and important question concerning the meaning and operation of Rule 40(j), SCRCF. It concerns whether there is an intersection or relationship between Rule 40(j), SCRCF and Rule 41, SCRCF. The Court of Appeals' interpretation permits repeated voluntary dismissals and restorations of the same civil action without identifying any point at which the litigation becomes final. That interpretation gives insufficient effect to the words "one time as a matter of right," does not adequately harmonize Rule 40(j), SCRCF with Rule 41,

SCRCP, does not satisfactorily account for or consider the Official Reporter's Notes, and creates tension with other decisions addressing Rule 40(j), SCRCP dismissals. The issue is of statewide importance and requires definitive resolution by this Court. The related summary-judgment and discovery issues further demonstrate that the case presents substantial questions concerning the application of South Carolina's procedural rules and the proper limits of summary judgment.

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