

Oct 16 2026

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Kristi F. Curtis, Circuit Court Judge

Unpublished Opinion No. 2026-UP-277
Appellate Case No. 2026-002061
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 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, Defendants,

Of whom Curtis Rogers and Julie Rogers are Petitioners,

AND

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010, Third-Party Plaintiff,

v.

Nationstar Mortgage LLC, Respondent.

RESPONDENTS' JOINT RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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2007-QH2 and Nationstar Mortgage LLC*

This Court should deny the Petition for Writ of Certiorari. None of the considerations in Rule 242(b), SCACR, is present. There is no novel question of law, no dissent at the Court of Appeals, no conflict with a prior decision of this Court, no substantial constitutional issue, and no federal question of any kind. The Court of Appeals' opinion is unanimous and unpublished. In an attempt to make this matter appear worthy of certiorari, Curtis and Julie Rogers call the meaning of Rule 40(j), SCRCR, "novel and unresolved." (Pet. at 2.) It is not. The Court of Appeals applied the plain text of Rules 40(j) and 41 to a record showing that the Rogerses consented to the Rule 40(j) orders they now attack, and that their counsel asked for the last one knowing it was the third. The circuit court also held the Rogerses' counterclaims time-barred, and the Petition does not challenge that ruling. What remains is a request to reweigh a summary judgment record and to second-guess discretionary rulings. This Court should deny the Petition.¹

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly hold, consistent with the plain text of Rules 40(j) and 41, SCRCR, that orders striking a case from the docket with leave to restore, two of which the Rogerses consented to and the last of which their counsel requested, are not adjudications on the merits?
2. Did the Court of Appeals correctly affirm the circuit court's discretionary discovery ruling, where the circuit court granted the Rogerses' motion to compel in part, the duty to identify trial witnesses continues until trial, and no trial has been scheduled?
3. Did the Court of Appeals correctly hold that the circuit court acted within its discretion in declining declaratory relief on issues that can be, or have been, litigated as defenses in the foreclosure action itself?
4. Did the Court of Appeals correctly hold that the Rogerses' malicious prosecution claim fails because a consensual Rule 40(j) strike is a procedural disposition, not a termination reflective of the merits?

¹Ashley Johnson Beshara, as Trustee, was an appellant in the Court of Appeals but did not petition for certiorari or join the Rogerses' Petition. The Petition is signed only by counsel for the Rogerses. (Pet. at 22.) The Court of Appeals' holdings specific to Beshara, including that her SCUTPA claim was brought in a representative capacity and that she was not a party to the prior actions, are not before this Court. (Op. at 9 n.5, 11.)

5. Did the Court of Appeals correctly affirm summary judgment on the Rogerses' abuse of process, negligent misrepresentation, and SCUTPA claims, where the Rogerses offered no evidence on essential elements and the circuit court independently held the claims time-barred, a ruling the Petition does not challenge?

COUNTER-STATEMENT OF THE CASE

In January 2007, Curtis Rogers signed a \$1,500,000 promissory note in favor of Homecomings Financial, LLC, secured by a mortgage on 2235 Shoreline Drive. (Op. at 2.) He stopped making payments by August 2009. (R. pp. 302–04.) Aurora Loan Services, LLC filed the first foreclosure action in September 2009. (Op. at 2.) In March 2010, after the parties agreed to pursue loss mitigation, the Master-in-Equity struck the case from the active roster “with leave to restore.” (R. pp. 30–31.)² The case was restored in March 2011. (R. p. 78.) In February 2012, the Rogerses amended their answer to assert counterclaims, including negligent misrepresentation, SCUTPA, declaratory judgment, and an accounting. (R. pp. 91–103.) Nationstar was substituted as plaintiff in June 2013. (Op. at 2.) In June 2014, the court entered a “Consent Order Striking Case from Active Docket Pursuant to Rule 40(j).” (R. pp. 32–33.) The order struck the case “with leave to restore” and recited the parties’ agreement to the Rule 40(j) tolling terms. (R. p. 32.) Counsel for the Rogerses, Mary Leigh Arnold, signed it under the words “WE CONSENT.” (R. p. 33.) A letter on her firm’s letterhead transmitted the proposed consent order to the Clerk for filing. (R. p. 358.)

On April 7, 2015, the court restored the case on plaintiff’s motion. (R. pp. 35, 75.) The restoration order was served on the Rogerses’ counsel. (R. pp. 76–77.) The Rogerses did not

²The Petition notes that this first order was not signed by the Rogerses or their counsel. (Pet. at 3.) That is true, and it does not matter. The order was entered by the court “with leave to restore,” and the Rogerses’ counsel received a copy. (R. pp. 30–31.) The Petition’s argument turns on the later strikes, to which the Rogerses consented.

object, and they did not appeal. (Op. at 7; R. p. 1044.)³ In May 2016, the case appeared on the trial roster. Plaintiff's counsel asked the court to strike it under Rule 40(j) and told the court that Ms. Arnold had "graciously consented" to the request. (R. p. 42.) Ms. Arnold then wrote to the court: "Pursuant to my conversation with John I just want a simple Order that says case struck pursuant to Rule 40j." (R. p. 39.) The court entered a Form 4 order stating: "By consent of the parties, (see attached), this case is Ordered stricken pursuant to Rule 40(j)." (R. p. 38.)⁴ Ms. Arnold knew exactly what she was agreeing to. By her own affidavit, when plaintiff's counsel called it the second strike, "I made him aware of the fact it would not be the second time but the third time." (R. p. 543.) She consented anyway.

No one moved to restore the case. In 2018, Ms. Arnold told plaintiff's new counsel that she would oppose any restoration. (R. pp. 543-44.) On August 27, 2019, Deutsche Bank filed this foreclosure action against Beshara, as trustee of the revocable trust that holds title. (R. pp. 104-113; Op. at 3.) The Rogerses intervened and asserted counterclaims against Deutsche Bank and cross-claims and third-party claims against Nationstar for abuse of process, malicious prosecution, negligent misrepresentation, SCUTPA, declaratory judgment, and an accounting. (Op. at 3.) The circuit court denied the Rogerses' motion for summary judgment, holding that successive Rule 40(j) orders do not operate as decisions on the merits. (R. pp. 6-7.) It noted that "Defendants consented to the prior cases being stricken under Rule 40(j), and that the dismissal under 40(j) is a dismissal without prejudice." (R. p. 22.) It granted Deutsche Bank and Nationstar summary

³The Petition states that the case was restored in 2015 "without motion." (Pet. at 4.) The restoration order recites that "Plaintiff has now moved for an order restoring this case to the active docket," and it was served on the Rogerses' counsel. (R. pp. 75-77.)

⁴The Petition repeatedly calls these orders "voluntary dismissals" and notes that the Form 4 orders were marked as ending the case. (Pet. at 3-4.) Each Form 4 was marked "Action Stricken" under Rule 40(j), not "Action Dismissed" under Rule 41(a). (R. pp. 34, 38.) The 2016 order recites that the case was stricken "[b]y consent of the parties." (R. p. 38.)

judgment on the counterclaims. The court held every claim except the accounting time-barred (R. pp. 8–9), and it held that each claim also failed on the merits (R. pp. 10–22). It granted the Rogerses’ motion to compel in part and ordered full responses to the standard interrogatories within ten days. (R. p. 23.)

The Court of Appeals unanimously affirmed. (Op. at 15.) Because its rulings were dispositive, it did not reach the statute of limitations, though it noted that any claim based on conduct in the prior actions was time-barred. (Op. at 10 n.6, 12 n.7, 15 n.10.) The court denied the Rogerses’ petition for rehearing and substituted its opinion on August 19, 2026.⁵ The Rogerses then filed this Petition.

ARGUMENT

The Rogerses claim certiorari is warranted because the Court of Appeals’ construction of Rule 40(j) presents a “novel and critical” question, conflicts with *Goodwin v. Landquest Development, LLC*, 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015), and will have “statewide consequences.” (Pet. at 2–3, 6, 12.) Each assertion is incorrect. The Court of Appeals enforced the rule as written. Its opinion conflicts with no decision of this Court, and *Goodwin*, a Court of Appeals decision, could not supply a Rule 242(b)(3) conflict even if there were one. The opinion is unpublished and announces nothing new. The remaining questions turn on this record, and the record forecloses them.

⁵The original opinion contained a typographical error stating that the circuit court “did err” in finding that the Rule 40(j) strikes were not adjudications on the merits. The Rogerses’ petition for rehearing seized on the error. (Pet. for Reh’g at 3–4.) The substituted opinion corrects it to “did not err.” (Op. at 6.) The Petition does not press the point.

I. The Court of Appeals correctly held that Rule 40(j) strikes entered by court order, with the Rogerses' consent, are not adjudications on the merits.

The Rogerses argue that Rule 40(j) permits only one strike and that later strikes operate as adjudications on the merits. (Pet. at 6–13.) The Court of Appeals rejected that argument for two independent reasons. First, Rule 40(j) contains no language limiting a party to one strike or making a later strike an adjudication on the merits. (Op. at 5.) Second, even if Rule 41's two-dismissal rule applied, it reaches only dismissals by notice, and every strike here was by court order. (Op. at 5–6.) The Rogerses raise six challenges. Each is discussed below.

a. The Court of Appeals construed Rule 40(j) by its text, not its title.

The Rogerses argue the Court of Appeals gave “undue importance” to the titles of Rules 40 and 41 and to the cover sheets used for the orders. (Pet. at 6–7.) That is not what the court did. Its holding rests on what the text of Rule 40(j) says, and what it does not say. (Op. at 5.) The titles were noted only to show that the two rules govern different situations. (*Id.*) *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993), which the Rogerses cite (Pet. at 6), involved using a heading to cut back plain text. That did not happen.

Rule 40(j) sits among the rules that govern the clerk's General Docket, the Jury Trial Roster, and the call of cases for trial. Rule 40, SCRCP. Its own heading is “Case Stricken From Docket by Agreement.” Rule 40(j), SCRCP. And a restored case “shall be placed on the General Docket and proceed from that date as provided in this rule.” *Id.* That is docket management. The cover sheets reflect the same distinction. Each Form 4 offered a box for “Action Dismissed” under Rule 41(a), and each order here was instead marked “Action Stricken” under Rule 40(j). (R. pp. 34, 38; Op. at 5.)⁶ The Court of Appeals read the rule's words, not its title.

⁶The Rogerses also note that the Form 4 orders were marked as ending the case. (Pet. at 7.) That notation closes the case number on the clerk's docket. Each time the case was restored, a new

- b. *The words “one time as a matter of right” describe a right; they do not create a bar.*

The Rogerses argue that the phrase “one time” is a “numerical limitation” that the Court of Appeals rendered meaningless. (Pet. at 7–8.) The flaw in this argument is that the phrase does not say what the Rogerses need it to say. Rule 40(j) provides that a party may strike its claim “one time as a matter of right, provided that all parties adverse to that claim . . . agree in writing.” Rule 40(j), SCRCP. The phrase “one time” is applied to the “right.” It means a party cannot demand a second strike as of right. (Op. at 5.) Any later strike still requires the written agreement of every adverse party. Rule 40(j), SCRCP. It places no limitation on later strikes made with consent of all parties and approval of the court. The Rogerses ask, “Does the Rule allow indefinite strikes?” (Pet. at 8.) The answer is in the text. No strike occurs unless every adverse party agrees in writing. The Rogerses held a veto over every strike they now complain about. Nothing in Rule 40(j) supports the bar the Rogerses seek.

- c. *The opinion is consistent with Goodwin v. Landquest Development, LLC.*

The Rogerses argue the opinion “is not reconcilable with *Goodwin*” because *Goodwin* treated a Rule 40(j) strike as the equivalent of a dismissal. (Pet. at 8–9.) The Court of Appeals addressed *Goodwin* directly, interpreting it 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.” (Op. at 8.) It then held that, even if *Goodwin* means a Rule 40(j) strike is a dismissal, a dismissal is not an adjudication on the merits. (*Id.*) The Court of Appeals is correct. Calling a strike a

civil action number was assigned. Those three civil action numbers are: 2009-CP-10-5840; 2011-CP-10-01805; 2015-CP-10-1971. (R. pp. 28–38.) It does not convert an order striking a case with leave to restore into an adjudication on the merits. Rule 40(j) itself contemplates that a stricken case may be restored and will then “proceed from that date.” Rule 40(j), SCRCP.

dismissal does not make it a dismissal with prejudice. Under Rule 41 itself, a dismissal by court order is without prejudice “[u]nless otherwise specified in the order.” Rule 41(a)(2), SCRCPP.

Moreover, *Goodwin* did not involve multiple strikes, and it did not hold that any strike operates as an adjudication on the merits. See *Goodwin*, 414 S.C. at 630–31, 779 S.E.2d at 830. In any event, *Goodwin* is a Court of Appeals decision. Rule 242(b)(3) looks to conflict “with a prior decision of the Supreme Court.” There is no conflict with *Goodwin*, and none with any decision of this Court.

d. Read together, Rules 40(j) and 41 confirm the Court of Appeals’ holding.

The Rogerses argue the Court of Appeals failed to harmonize Rule 40(j) with Rule 41, including Rule 41(b), and ignored the 1994 Reporter’s Notes. (Pet. at 2–3, 9–11.) The Rule 41(b) argument is not properly before this Court. The Rogerses’ briefs to the Court of Appeals relied on Rule 41(a)’s two-dismissal rule. (Appellants Rogers’ Final Br. (“Rogerses’ Br.”) at 27–28.) They first quoted Rule 41(b) in their petition for rehearing. (Pet. for Reh’g at 7.) Rule 242(d)(1), SCACR, limits a petition to questions “raised in the Court of Appeals *and* in the petition for rehearing” (emphasis added). An argument first made on rehearing satisfies only half of that requirement. See *Nelson v. QHG of S.C., Inc.*, 362 S.C. 421, 427, 608 S.E.2d 855, 858–59 (2005) (noting that an issue first raised in a petition for rehearing with the Court of Appeals was not preserved for appellate review by the Supreme Court).

The argument also fails on its own terms. Rule 41(b) provides that a dismissal not provided for in Rule 41 operates as an adjudication on the merits “[u]nless the court in its order for dismissal otherwise specifies.” Rule 41(b), SCRCPP. Every order here otherwise specified. Each struck the case “with leave to restore” or “pursuant to Rule 40(j),” by consent. (R. pp. 30–33, 38.) Rule 41(b) also governs involuntary dismissals for failure to prosecute or to comply with the rules. *Id.*

No one sought such a dismissal. The rest of Rule 41 points the same way. A dismissal by order is without prejudice unless the order says otherwise. Rule 41(a)(2), SCRCPP. The two-dismissal rule applies only to a plaintiff's notice of dismissal. Rule 41(a)(1), SCRCPP. Courts applying the federal rule and similar state rules agree that it does not reach dismissals by order or stipulation. (Op. at 5–6 (collecting cases).)⁷ And when a plaintiff refiles a previously dismissed claim, Rule 41 prescribes costs, not a bar. Rule 41(d), SCRCPP. Harmonizing the rules does not help the Rogerses. It defeats their argument.

The Reporter's Notes do not change the analysis. The Court of Appeals did not ignore the Notes. It cited the 1994 Note in construing Rule 40. (Op. at 8.) And the Notes, as the Rogerses quote them, state that Rule 40(j) "now requires all adverse parties to consent to the dismissal in writing" and that "[a] case can *also* be dismissed voluntarily under Rule 41(a)." (Pet. at 10 (emphasis added).) The word "also" describes Rule 41(a) as an alternative. It does not import Rule 41(a)'s two-dismissal rule into Rule 40(j).⁸ Rule 40(j) supplies its own consequence for delay. Tolling applies only "if the claim is restored upon motion made within 1 year of the date stricken." Rule 40(j), SCRCPP. A party who waits longer loses the benefit of tolling and faces the statute of limitations. That is the finality mechanism the drafters chose. The Court of Appeals did not fail to harmonize the rules. It applied them as written.

⁷See *Manning v. S.C. Dep't of Highway & Pub. Transp.*, 914 F.2d 44, 47 n.3 (4th Cir. 1990) ("[t]he two dismissal rule applies when the second dismissal is by notice, but not when the defendant is dismissed by motion or stipulation"); *ASX Inv. Corp. v. Newton*, 183 F.3d 1265, 1268 (11th Cir. 1999); *Est. of Livesay ex rel. Morley v. Livesay*, 723 S.E.2d 772, 776 (N.C. Ct. App. 2012); *Crawford v. Kingston*, 728 S.E.2d 904, 906 (Ga. Ct. App. 2012). The out-of-state foreclosure decisions the Rogerses cited arose under different statutes and rules, including Illinois's statutory single-refiling rule. (Rogereses' Reply Br. at 3–6.) None construed Rule 40(j).

⁸The same Note describes Rule 40(j) as "more restrictive than the former Rule 40(c)(3)" and explains that it "now requires all adverse parties to consent to the dismissal in writing." (Beshara Reply Br. at 4–5 (quoting Rule 40, SCRCPP, Note to 1994 Amendment).) The restriction the drafters chose was consent. The Rogerses gave it.

- e. The opinion does not permit litigation without end, and this record is a poor vehicle for the question.*

The Rogerses argue the opinion permits a plaintiff to strike and restore a case indefinitely “without an apparent endpoint or consequence.” (Pet. at 2, 11–12.) That is not accurate. The opinion holds only that court-ordered Rule 40(j) strikes are not adjudications on the merits. (Op. at 6.) The rules supply the limits. Every strike requires the written consent of every adverse party. Tolling is lost if the case is not restored within a year. A defendant may move to dismiss for failure to prosecute under Rule 41(b), and a court may award costs on refiling under Rule 41(d). The Rogerses invoked none of these protections. Instead, they agreed to the strikes. They consented to the 2014 strike in a signed consent order. (R. pp. 32–33.) They did not object to the 2015 restoration. (R. pp. 75–77; Op. at 7.) Their counsel asked for “a simple Order that says case struck pursuant to Rule 40j” in 2016, knowing it was the third strike. (R. pp. 39, 543.) They never argued to the circuit court that the strikes were improper when they were entered. (Op. at 6–7.) A party “cannot take [its] chances of a successful issue, reserving vices in the trial, of which [it] has notice, for use in case of disappointment in the result.” *Brown v. Singletary*, 226 S.C. 482, 484, 85 S.E.2d 738, 738 (1955) (cited in Op. at 7). The “cycle” the Rogerses decry is one they joined. This record is a poor vehicle for the question the Rogerses present.

- f. An unpublished, fact-bound opinion has no statewide consequences.*

The Rogerses argue the opinion, “[a]lthough [u]npublished,” will have statewide consequences for foreclosure, contract, tort, probate, and construction litigation. (Pet. at 12–13.) It will not. An unpublished opinion has no precedential value and may not be cited as precedent except in limited circumstances. Rule 268(d)(2), SCACR. It binds no trial court. The Rogerses cite no South Carolina decision, published or unpublished, holding that Rule 40(j) strikes are

subject to a two-dismissal rule. There is no split for this Court to resolve, and certiorari should be denied on the first question.

II. The Court of Appeals correctly affirmed the circuit court’s discovery ruling, which preserved the Rogerses’ right to learn the identity of trial witnesses.

The Rogerses argue the Court of Appeals “reopen[ed] the door to the practice of trial by surprise or ambush” by not requiring Respondents to identify trial witnesses. (Pet. at 13.) The Court of Appeals did no such thing. It held that the duty to answer standard interrogatories about trial witnesses “is ongoing until trial,” and it stated that nothing in the circuit court’s order precludes the Rogerses “from filing additional motions on this issue once a trial is scheduled.” (Op. at 15.) The circuit court did not refuse discovery either. It granted the Rogerses’ motion to compel in part and ordered full responses to the standard interrogatories within ten days. (R. p. 23.) A trial judge’s discovery rulings “will not be disturbed by an appellate court absent a clear abuse of discretion.” *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009). There was none. The Rogerses rely on *Samples v. Mitchell* for the proposition that prejudice is presumed when discovery is withheld. (Pet. at 13–14.) No trial has been scheduled, much less held. The Rogerses’ fear that a future motion might be denied as “law of the case” (Pet. at 14) is answered by the opinion itself, which expressly preserves their right to file one. (Op. at 15.) There is no “trial by ambush” because there has been no trial.

III. The Court of Appeals correctly held that the circuit court acted within its discretion in declining declaratory relief.

The Rogerses argue the Court of Appeals “creat[ed] limitations in the Declaratory Judgment Act that do not exist” because Rule 57 provides that “[t]he existence of another adequate remedy does not preclude” declaratory relief. (Pet. at 15.) The flaw in this argument is that Rule 57 permits declaratory relief; it does not require it. The decision to grant a declaratory judgment

“rests in the sound discretion of the trial court,” and declaratory relief “will ordinarily be refused where another remedy will be more effective or appropriate.” *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 820–21 (1995) (cited in Op. at 13). The case the Rogerses rely on says the same thing: a court “should not exercise such power lightly.” (Pet. at 15 (quoting *Smith v. S.C. Ret. Sys.*, 336 S.C. 505, 527–28, 520 S.E.2d 339, 351 (Ct. App. 1999)).) The declarations the Rogerses seek confirm that the circuit court acted well within its discretion. (Pet. at 16.) The first, whether Rule 41 and collateral estoppel bar this action, was decided against them on the merits. (Op. at 6 & n.3.) The rest, concerning unconscionability and the chain of title to the note and mortgage, go to Deutsche Bank’s right to enforce the loan. Those issues “can be or have been litigated in this current action.” (Op. at 13.) The Rogerses have asserted standing defenses since the earlier actions. (R. p. 172.)⁹ Section 15-53-30 authorizes declarations about written instruments; it does not compel a court to issue them in duplicate. The Court of Appeals correctly affirmed a discretionary ruling.

IV. The malicious prosecution claim fails with the Rule 40(j) argument, and independently.

The Rogerses argue the malicious prosecution claim “presents a related question of law” because, if repeated Rule 40(j) strikes carry merits-based consequences, the favorable-termination analysis changes. (Pet. at 17–18.) That concedes the claim is derivative. It falls with their Rule 40(j) argument. It also fails independently. A favorable termination is “a termination reflective of the merits,” meaning “a termination consistent with a finding for the defendant on substantive

⁹The Rogerses contend that the complaint does not put these issues before the court and that a general denial will not either. (Pet. at 16.) But a foreclosing party must prove its right to enforce the note and mortgage, and the Rogerses remain free to contest that right and to assert unconscionability as defenses. The circuit court’s order did not adjudicate those contested issues on the merits. (Op. at 13 n.9.)

grounds and not based solely on technical or procedural considerations.” *Gecy v. Somerset Point at Lady’s Island Homeowners Ass’n*, 426 S.C. 540, 553, 828 S.E.2d 73, 80 (Ct. App. 2019) (cited in Op. at 8). A strike from the docket, entered by consent with leave to restore, is a procedural disposition. It is the opposite of a termination on the merits. The Court of Appeals correctly held the claim fails as a matter of law.

V. The Court of Appeals correctly affirmed summary judgment on the Rogerses’ remaining claims.

The Rogerses argue the Court of Appeals resolved disputed factual inferences against them. (Pet. at 18.) Their Petition lists nine categories of “evidence” but cites no record evidence for any of them. (*Id.*) A party opposing summary judgment “may not rest upon the mere allegations or denials of his pleadings.” *Coker v. Cummings*, 381 S.C. 45, 54, 671 S.E.2d 383, 388 (Ct. App. 2008) (cited in Op. at 4). And “[a] conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact.” *Shupe v. Settle*, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct. App. 1994) (cited in Op. at 4). The Court of Appeals weighed nothing. It found nothing to weigh.

a. The Rogerses offered no evidence of an ulterior purpose or an improper act in the use of process.

The Rogerses argue their abuse of process claim rests on the “cumulative conduct” of striking, restoring, and refileing foreclosure actions. (Pet. at 18–19.) Abuse of process requires “an ulterior purpose” and “a wilful act in the use of the process not proper in the regular conduct of the proceeding.” *Johnson v. Painter*, 279 S.C. 390, 391, 307 S.E.2d 860, 860 (1983). The Rogerses identified no purpose other than foreclosing on the property and no threat or coercion. (Op. at 8–9 (citing *Hainer v. Am. Med. Int’l, Inc.*, 328 S.C. 128, 136–39, 492 S.E.2d 103, 107–08 (1997)).) The filing of this action cannot support the claim, because the tort reaches only misuse

of process “after its issuance.” (Op. at 9 (quoting *Painter*, 279 S.C. at 391, 307 S.E.2d at 860).) And the Rule 40(j) strikes, which the Rules expressly authorize and to which the Rogerses consented, are not acts “not authorized by the process or aimed at an object[ive] not legitimate in the use of the process.” (Op. at 9 (quoting *Hainer*, 328 S.C. at 136, 492 S.E.2d at 107).) The claim fails as a matter of law.

b. The Rogerses identified no false statement, no reliance, and no loss.

The Rogerses argue the Court of Appeals improperly treated their seventeen-year contest of foreclosure as negating reliance, and they point to Curtis Rogers’s testimony. (Pet. at 19–20 (citing R. pp. 297–99, 318–21).) That testimony does not help them. Asked what false representations were made, Mr. Rogers identified “the chain of title of the note as well as, you know, the pick-and-pay loan.” (R. p. 297.) Loan terms and litigation positions are not false statements of present fact. (R. pp. 10–11.) His reliance testimony concerned telephone calls with Aurora, a predecessor servicer, “between 2010 and 2012.” (R. pp. 298–99.) Any claim based on those calls is time-barred. (Op. at 10 n.6.) Further, he could not recall what statements his pleading even referred to. (R. p. 299.) The claim also fails on an element the Petition does not address. The Rogerses offered no evidence of pecuniary loss caused by reliance. When asked whether he lost money because of the alleged misrepresentations, Mr. Rogers did not recall. (Op. at 10.) The only payment he remembered was a check for a workout agreement he voluntarily entered. (*Id.*) The Court of Appeals correctly held the claim fails as a matter of law.

c. The Rogerses’ SCUTPA arguments are unpreserved, and they fail on the merits.

The Rogerses argue the Court of Appeals misapplied *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 693 S.E.2d 27 (Ct. App. 2010), that attorney’s fees from the prior actions are recoverable as actual damages under *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971), and that Curtis

Rogers’s credit was damaged. (Pet. at 20–21.) Start with *Mull*. The Rogerses ask this Court to revisit *Mull*, a published Court of Appeals decision. Disagreement with Court of Appeals precedent is not a conflict with a decision of this Court. Rule 242(b)(3), SCACR.

The *Addy* argument is not preserved. The Rogerses did not cite *Addy* to the Court of Appeals. Beshara did. (Appellant Beshara’s Final Br. (“Beshara Br.”) at 27–28.) The Rogerses did not raise it in their petition for rehearing either. Beshara did not petition this Court. The argument falls outside the scope of Rule 242(d)(1). It also fails on the merits. As Beshara’s own brief quoted it, *Addy* requires “that the dispute was with a third party — not with the defendant.” (Beshara Br. at 27–28 (quoting *Addy*, 257 S.C. at 33, 183 S.E.2d at 708).) The fees the Rogerses seek were incurred defending foreclosure actions brought by Respondents and their predecessors. And the Rogerses limit their claim to fees “for the three (3) prior actions . . . exclusive of the cost and expenses incurred in this matter.” (Pet. at 20.) Those are precisely the fees the Court of Appeals held time-barred. (Op. at 12 n.7.)

The credit-damage testimony is likewise unpreserved. The Rogerses did not rely on it in support of their SCUTPA claim in the Court of Appeals or in their petition for rehearing. (See Rogerses’ Br. at 20–22; Pet. for Reh’g at 19.) Mr. Rogers gave that testimony when asked about abuse of process damages. (R. p. 302.) He admitted he stopped making payments by August 2009, that missed payments affect credit, and that no lender told him it declined credit because of the foreclosure action rather than the nonpayment. (R. pp. 303–04.)

Finally, the Rogerses argue the three prior actions show a “potential for repetition.” (Pet. at 21.) The Court of Appeals held that the only unfair act the Rogerses identified, a loan-modification offer Mr. Rogers considered unaffordable, does not affect the public interest, and that they offered no evidence that other consumers were harmed. (Op. at 12; R. pp. 304–05.) Three

actions against the same borrower on the same loan show only that one foreclosure has been long-running.¹⁰ The SCUTPA claim fails as a matter of law.

Every one of these claims fails for a reason the Petition never mentions. The circuit court held all of the Rogerses' claims except the accounting time-barred. (R. pp. 8–9.) Respondents defended that ruling on appeal. (Resp't Deutsche Bank's Final Br. ("Deutsche Bank Br.") at 9–12.) The Court of Appeals had no need to reach it, but noted that claims based on the prior actions were barred. (Op. at 10 n.6, 12 n.7, 15 n.10.) None of the five questions presented challenges that ruling. (Pet. at 1.) Even if this Court disagreed with the Court of Appeals on every other point, the counterclaims would remain time-barred. Review would change nothing, and certiorari must be denied.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari. The Court of Appeals' unanimous, unpublished opinion involves no novel question of law and is consistent with existing law.

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¹⁰*Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (1997), and *York v. Conway Ford, Inc.*, 325 S.C. 170, 480 S.E.2d 726 (1997), on which the Rogerses rely for "potential for repetition" (Pet. at 21), involved business practices directed at the consuming public. Neither involved litigation between a lender and a single borrower over a single loan.

Respectfully submitted,

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