THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Common Pleas Case No. 2009-CP-43-2538
Court of Appeals Case No. 2013-000255

First Citizens Bank and Trust Company, Inc.,.....Respondent,

v.

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T. Brooks, III, is.....Petitioner.

PETITION FOR WRIT OF CERTIORARI AND MEMORANDUM IN SUPPORT

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner

Other counsel of record in appeal:

Damon C. Wlodarczyk, Esq.
Riley Pope & Laney, LLC
Post Office Box 11412
Columbia, South Carolina 29211
(803) 799-9993
Attorney for Respondent

The Petitioner, Charles T Brooks, III, who was the Appellant below and is hereinafter, sometimes, referred to as "Brooks," hereby moves and petitions this Court, pursuant to Rule 242, SCACR, as well as all other applicable law, for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in this case. Petitioner respectfully submits that this is a proper case for such review by this Court, as the decision of the Court of Appeals applies an issue preservation analysis at odds with this Court's jurisprudence and the Court of Appeals' own jurisprudence, fails to apply controlling precedent, and fails to take notice of matters in the record that mandate a result opposite that reached by the Court of Appeals, as is noted in the memorandum below.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on June 25, 2014. Counsel for the Petitioner certifies that the petition for rehearing was served on July 9, 2014, and filed on July 10, 2014, and was finally ruled on by the Court of Appeals by order filed on August 25, 2014.

QUESTIONS PRESENTED

The questions presented for review in this case, while discussed in detail below, may be succinctly stated as follows:

1) Did the Court of Appeals err in applying an erroneous, unduly stringent issue preservation standard, a standard that appears to have required the Petitioner to make a motion pursuant to Rule 59(e), SCRCP, in order to preserve arguments for appellate review even when those arguments were already raised to and already ruled upon by the master-in-equity below?

2) Was the Petitioner correct on the merits of the issues the Court of Appeals found unpreserved?

3) Did the Court of Appeals err in applying an erroneous summary judgment analysis, one that appears to have required the Petitioner to have put factual material into the record himself on a given point in order to prevail on an argument that there was a genuine issue of material fact on a certain point, even though the factual material submitted by the Respondent in support of its motion for summary judgment contained all that is needed to demonstrate the existence of that factual issue?

STATEMENT OF THE CASE

Respondent (hereinafter "First Citizens") filed a summons and complaint on October 30, 2009, seeking foreclosure of a mortgage given to a predecessor bank by Brooks. Brooks timely served and filed an answer to the complaint. Brooks' answer contained only admissions and denials of First Citizens' allegations and did not assert any affirmative defenses or counterclaims.

First Citizens and Brooks reached a settlement, which was memorialized in two documents drafted by someone on behalf of First Citizens, one entitled "Release and Settlement Agreement" and the other (not dated) entitled "Forbearance Agreement – In Foreclosure." Under the forbearance agreement, Brooks was required to make an initial $5,000.00 payment and monthly $1,500.00 payments to First Citizens until March 1, 2011. Brooks made monthly payments pursuant to the forbearance agreement, which were accepted by First Citizens for several months after March 1, 2011.

These settlement documents contain numerous ambiguities, as Brooks later argued to the master-in-equity. The "Release and Settlement Agreement" document provides in material terms as follows:

> Brooks and First Citizens now desire to settle, compromise, and resolve the foreclosure action pursuant to the terms and conditions hereinafter set forth in this settlement agreement.
>
> . . .
>
> **Settlement Terms.** Brooks shall (1) sign a separate forbearance agreement on the Office Mortgage [which is how the parties referred to the mortgage at issue – Brooks had other properties mortgaged with the same bank] to resume payments plus arrearage for a period of 12 months, at the conclusion of which a balloon payment will be due for the entire amount due; . . . (4) refinance the Office Mortgage to include the deficiency amounts once [other properties mortgaged to the same bank] have sold and the deficiency amounts are fixed; . . . [and,] in consideration for First Citizens to (1) hold the foreclosure on the Office Mortgage as long as the Court will allow or until Brooks defaults on any portion of this Agreement[.]
>
> **Covenant Not To Sue.** Brooks agrees to withdraw his Answers in the current litigation . . . and agrees to take any actions necessary to facilitate the dismissal of the foreclosure. . . .

The forbearance agreement document materially provides as follows:

> 1. Lender's Forbearance. Lender [First Citizens] shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there exists no Event of Default as such term is defined herein at Paragraph 5;
>
> 2. . . . Borrower [Brooks] hereby withdraws its [sic] answer and defenses with prejudice;
>
> 3. Borrowers Payment of the Arrears. THIS FORBEARANCE AGREEMENT IS NOT DESIGNED TO CURE THE ARREARAGE. The intent of this agreement is to provide time for the Lender to sell other properties deeded to it from Borrower as part of a separate Settlement and Release Agreement dated March ___, 2010 [(this is the settlement agreement document dated April 7, 2010)]. At the conclusion of this agreement the Loan shall be refinanced to include

any deficiency from the sale of the other properties. This must be accomplished no later than March 1, 2011. Borrower shall comply with this agreement in the following manner:

a. By paying to Lender the sum of $5,000.00, in certified funds, no later than March 15, 2010; this payment is to be applied to the arrearage;

b. By paying to Lender the sum of $1,500.00, in certified funds, due the first day of each month beginning April 1, 2010, and ending March 1, 2011.

c. On March 1, 2011 the balance of the loan will become immediately due and payable, should Borrower and Lender fail to enter a separate agreement by that date to cure the arrearage or pay off this loan. The balance of the loan will include the capitalization of all accrued interest on the principal, fees, and other amounts as they become due during the course of this Agreement because the payments specified hereunder are not designed to cure the arrearage.

d. If this is an escrowed loan, the regular monthly payment amount may change during the term of this agreement. If so, the Borrower will be required to pay the new regular monthly payment amount in addition to the monthly payment amount designed to cure the arrearage.

e. By paying to lender any additional default and/or foreclosure costs which may be incurred by Lender during the course of this Agreement.

4. Borrower's Payment of Payments Coming Due. Commencing with the regular payment due (next regular payment date), Borrower shall make all future Payments as they become due, which Payments may change in accordance with the terms of the Notes and Mortgage.

5. Events of Default. If Borrower fails to make any of the payments of the Arrears as specified herein on the due date hereof; if the Borrower fails to make any of the Payments pursuant to the terms of the Notes and Mortgage; of [sic] if the Borrower fails to keep a promise or agreement or perform or discharge any agreement, covenant, obligation or undertaking created or agreed to by Borrower in the Loan Documents and

this Agreement, same shall constitute an event of default ("Event of Default") hereunder and under the Loan Documents.

6. Lender's Rights and Remedies Upon Events of Default. Upon and after the occurrence of an Event of Default all amounts then remaining unpaid under the Loan Documents and this Agreement shall be immediately due and payable and Lender shall be free to exercise any or all rights and remedies provided for under the Loan Documents, including, but not limited to, continuance of the foreclosure action, which rights and remedies are incorporated herein by reference as if fully set forth herein. By entering into this Agreement, Lender shall in no way be considered to have waived or have been estopped from exercising any or all of its rights and remedies under the Loan Documents. Noting [sic] contained herein shall constitute a waiver of any or all of the Lender's rights or remedies including the right to proceed with the foreclosure action. This Agreement shall not be construed as a discontinuance of the foreclosure action and any forbearance by the Lender and acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreeclosure action.

It is also agreed that the Lender, may without further notice to the Borrower, proceed ex parte with all further proceedings in the foreclosure action, inclusive of the order of reference, appointment of a referee, preparing a referee's oath and report and entering final judgment of foreclosure and sale, except that the Lender agrees to forbear in scheduling the foreclosure sale as long as an Event of Default does not exist. . . .

. . .

13. Reinstatement. In the event Borrower cures the Arrears by making all payments required under paragraphs [sic] 3, is current with the Payments then due, and no Event of Default exists under the Loan Documents and this Agreement, Lender shall reinstate the Notes and Mortgage according to its original terms and conditions.

Brooks made all the payments provided for under paragraph 3 of the forbearance agreement. In fact, he made more. Though March 1, 2011, came and

went, Brooks continued to make monthly payments in the same amount called for under the forbearance agreement, and First Citizens accepted the continuing payments without complaint. He fell moderately behind on those payments and sought to catch them up, but First Citizens refused to allow him to do that.

On August 9, 2012, First Citizens served a motion for summary judgment. The text of the motion simply stated that it was made "on the grounds that there is no genuine issue as to any material fact and the Plaintiff is entitled to an Order for Foreclosure and Sale as a matter of law. Said motion shall be based upon the statute and case law of the State of South Carolina, upon the pleadings and other evidence developed in discovery and upon the affidavits attached hereto and other material properly received by the Court in connection therewith." It attached an affidavit of Dave Davies, to which were in turn attached a copy of a note, a mortgage, and the "Release and Settlement Agreement" and "Forbearance Agreement – In Foreclosure" mentioned above. Davies' affidavit contained the following statement:

> On March 7, 2010, Charles T. Brooks entered into a Settlement Agreement with the Plaintiff in which for valuable consideration, Plaintiff agreed to allow Mr. Brooks to enter into a forbearance agreement on the above referenced defaulted Note and Mortgage. The Settlement Agreement attached hereto as Exhibit "C" and Forbearance Agreement attached hereto as Exhibit "D" are incorporated by reference as if fully set forth verbatim. The terms of the Settlement Agreement provided in part that Charles T. Brooks agreed to withdraw his Answer in the above captioned case. Charles T. Brooks has failed to comply with the provisions of the Settlement Agreement.

Davies' affidavit contained no other statements about a purported default of the settlement agreement or the forbearance agreement. The forbearance agreement document attached to the affidavit states that Brooks "hereby withdraws its [sic] answer and defenses with prejudice[.]"

Before the summary judgment hearing, Brooks timely served and filed his own affidavit. Brooks' affidavit states as follows:

> Up to around Christmas of 2011, I continued to make the monthly forbearance payments to First Citizens in the monthly payment amounts. First Citizens always accepted those payments.
>
> After I fell behind in those payments, I asked First Citizens, through its counsel, to provide me with a reinstatement figure to bring those payments current. As the attached emails show, First Citizens would not provide that to me.
>
> At the time I requested the reinstatement figure, I could have brought the monthly payments current; however, First Citizens would not provide me with a reinstatement figure, much less accept a payment to bring the loan current.

Printouts of emails between Brooks and counsel for First Citizens were attached to the affidavit and confirmed First Citizens would not provide Brooks a reinstatement figure.

On November 19, 2012, the Sumter County Master-in-Equity held a hearing[1] on the motion for summary judgment, after which he issued an order that was filed January 23, 2013. That order contained the following:

> The Plaintiff argued at the hearing that the affidavits it filed established the debt amount owing and that Defendant Brooks is in default of the note, mortgage, and forbearance agreement (which are described below). The Plaintiff argued that, coupled with an affidavit of attorneys' fees and costs that Plaintiff's counsel stated he was ready to submit, these materials showed that the Plaintiff was entitled to judgment as a matter of law. The Plaintiff argued that Defendant Brooks' affidavit failed to show the existence of a genuine issue of material fact because, even taking the statements in that affidavit as true, Defendant Brooks

[1] No court reporter was present at the hearing, which arguably prevented compliance with Rule 71(a), SCRCP. ("In all [foreclosure] actions a record of hearings shall be made and preserved in the case file in the office of the clerk of court.")

was still in default of the written terms of the forbearance agreement. Defendant Brooks argued that the Plaintiff's continued acceptance for some months of payments less than the balance due under the written terms of the forbearance agreement (the balance of the loan) constituted either a modification of the terms of the note, mortgage, and/or forbearance agreement through a course of dealing and conduct between the parties, an estoppel or laches of the Plaintiff's right to declare a default under the terms of the forbearance agreement as written, or a waiver of any such default. Defendant Brooks maintained that the evidence showed at least an issue of material fact as to these matters. He provided the Court and Plaintiff's counsel with copies of Rakestraw v. Dozier Assocs., Inc., 285 S.C. 358, 329 S.E.2d 437 (1985), and King v. PYA/Monarch, Inc., 317 S.C. 385, 453 S.E.2d 885 (1995), and argued that these cases support his argument. The Plaintiff countered with an argument that the parol evidence rule precluded Defendant Brooks' arguments because the forbearance agreement was an integrated writing. Defendant Brooks countered by stating that a contract may be modified by means other than writing even if it states that modifications must be in writing and that, since the conduct at issue occurred after the execution of the forbearance agreement, it did not fall within the ambit of the parol evidence rule. Defendant Brooks contended that all ambiguities in the operative documents should be construed against the Plaintiff. The Plaintiff acknowledged that it drafted the documents at issue but denied that there are any material ambiguities in them. Defendant Brooks contended that, under the requirements of equity and the operative terms between the parties as affected by the conduct between them, the Plaintiff could not treat the loan as matured and was required to let Defendant Brooks reinstate by bringing current the amount that would have been paid had he continued making $1500.00 monthly payments to the present day, that the Plaintiff had refused to let him do that, and that the course of conduct between the parties created a fact issue as to whether he has a right to reinstate, a fact issue as to what the debt amount owed to the Plaintiff is, and a fact issue as to whether the Plaintiff is entitled to foreclosure. The Plaintiff argued that there was no genuine issue of material fact because the affidavits on file showed that Defendant Brooks was in default of the terms of the note, the terms of the mortgage, and the terms of the forbearance agreement.

After reviewing and taking into consideration the pleadings and affidavits submitted in this case as well as the arguments presented at the motion hearing, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT[2]:

10) The Note and Mortgage matured on May 5, 2010.

. . .

13) The Line of Credit matured on August 2, 2008.

. . .

21) The Plaintiff and the Defendant Brooks entered into a release and settlement agreement dated April 7, 2010, which was a valid and binding agreement and also entered into a forbearance agreement which was a valid and binding agreement in which, among other things, Defendant Brooks agreed to pay the sum of $1,500.00 per month toward arrearage beginning April 1, 2010 and ending March 1, 2011, at which time the remaining balance became due and payable. The forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit proper, but was silent on the issue of the maturity of the original note and the post-maturity status of the line of credit note during the forbearance period.

22) The forbearance agreement contained default terms that provided for acceleration of all unpaid amounts under both the agreement and the loan documents.

23) The forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff's right to proceed with the foreclosure action.

24) The forbearance agreement provided in part that Defendant Brooks would withdraw his answer in this

[2] Other findings of fact in the order, not relevant to this petition, have been omitted here but may be found in the record shown in the appendix filed herewith.

matter and the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter but in any event, the Answer has not been withdrawn.

25) Defendant Brooks made monthly payments pursuant to the forbearance agreement which were accepted by Plaintiff for several months after the maturity date of the original forbearance agreement but has not paid the balance of unpaid amounts due under the forbearance agreement or the loan documents.

26) All payments made under the terms of the loan documents and after entry into the forbearance agreement are not accounted for in the affidavits submitted by the Plaintiff.

CONCLUSIONS OF LAW

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1) That there is no genuine issue of any material fact as to the findings setting forth in paragraphs 1 through 25 above and Defendant Brooks is prohibited from further contesting those findings in future proceedings.

2) That the Court convene a non-jury trial on February 7th, 2013 at 11:00 A.M., at which time the parties will present evidence as to the following remaining issues:

a. The balance due Plaintiff after giving credit for all payments made pursuant to the loan documents and also the forbearance agreement;

b. The intention of the parties in Defendant Brooks' payment of and Plaintiff's acceptance of monthly forbearance payments after the March 1, 2011 maturity date of the original forbearance agreement, the relevance of the language of the forbearance agreement referring to acceptance of payments, and the effect on Plaintiff's right to proceed with foreclosure;

c. Whether or not Plaintiff [sic] made any monthly payments as they came due under the existing loan documents after entering into the settlement and forbearance agreements, and the effect of the

> forbearance agreement upon the post-maturity status of the line of credit note at the inception of the forbearance agreement and the maturity of the real estate note and mortgage during the forbearance period.

Brooks received written notice of the entry of the order on February 4, 2013, three days before the trial date given in the order. Brooks served a notice of appeal to the Court of Appeals on February 5, 2013, two days before the trial date in the order.

In the Court of Appeals, Brooks raised three issues:

> I. Did the lower court err in making a factual finding that "the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit[,]" in addition to the payments called for under the language of the forbearance agreement, where ambiguity in the document (particularly when coupled with the parties' course of dealing) created an issue of material fact on that point?
>
> II. Did the lower court err in making a factual finding that "[t]he forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff's right to proceed with the foreclosure action" without also making findings as to other language in the documents at issue that makes the term ambiguous?
>
> III. Did the lower court err in making a factual finding that "the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter" when the record showed an issue of fact about that and, in any event, the matters in dispute arose well after the answer was served?

In an unpublished opinion, the Court of Appeals affirmed the master's decision. It found the first two issues named above were not preserved for appellate

review[3] because Brooks did not make a Rule 59(e) motion with regard to them and determined, apparently, that there was not a scintilla of evidence in the record that Brooks did withdraw his answer, apparently basing this decision on a failure of Brooks to submit evidence on this point. Brooks petitioned the Court of Appeals for rehearing, and that petition was denied.

ARGUMENT

I. The Court of Appeals' holding that the first two issues were unpreserved for review contravenes this Court's jurisprudence, as well as that of the Court of Appeals.

No magic words are required to be said below in order that an issue be preserved for review on appeal. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) *overruled on other grounds by* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation). This Court has noted that "civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party" in the context of issue preservation. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 780 (2004). This Court has also remarked upon "the need to approach issue preservation rules with a practical eye and not in a rigid, hypertechnical manner." Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). In consonance with this Court's decisions in this regard, the

[3] First Citizens did not argue that the issue of whether the master erred in finding Brooks failed to withdraw his answer was unpreserved, thus conceding that it is preserved. See McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).

Court of Appeals, just five days after its decision in the instant case, held that an off-the-record argument noted in a general way in an order ruling against the party who advanced it was preserved for review. Allegro Inc. v. Scully, Op. No. 5245 (S.C. Ct. App. filed June 30, 2014) (Shearouse Adv. Sh. No. 26 at 118, 128).

Despite the marked similarity between this case and the situation in Allegro vis-à-vis preservation of the subject issues, the Court of Appeals here determined that two of the issues raised by Brooks in this appeal are not preserved for review. These issues, however, are preserved for review. The master noted Brooks' argument that "all ambiguities in the operative documents should be construed against [First Citizens,]" and the master's order rules on and against that argument in the very particulars that the Court of Appeals found were unpreserved.

While the Court of Appeals' memorandum opinion does not articulate its analysis of the preservations questions, that opinion seems to indicate that these issues are unpreserved because Brooks did not make a motion about them under Rule 59(e), SCRCP. This is error. It is "[w]here a matter is not ruled on by the circuit court [that] the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). Rule 59 motions are not necessary to preserve issues that have been ruled upon by the circuit court; rather, "they are used to preserve issues that have been raised to the trial court but not yet ruled upon by it." Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 734 (1998); accord Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001). The master did rule on these issues. Just as Brooks need not have stated any magic words to preserve these arguments, neither did the master need to. See e.g.

Toole, 260 S.C. at 240. His recognition of these arguments and ruling against them was enough to preserve these issues.

Furthermore, in light of the procedural posture of the case at the time of this appeal, Brooks had little choice but to bring the appeal without first making a Rule 59(e) motion on these points. The master's order set the case for trial on February 7, 2013, and Brooks received written notice of the entry of the order on February 4, 2013. There was not time to make a motion to reconsider and have it heard and ruled upon before a trial would be had with the findings the master made in his order established for that trial's purposes. The pendency of a motion to reconsider would not have stayed the trial. See Rule 62, SCRCP. Under the circumstances, which include the failure of the lower court or First Citizens (the moving party) to provide a court reporter, the master's recognition of Brooks' arguments is sufficient for their preservation for review by this court. To find that the law is otherwise is to countenance a most unjust Catch-22 for a litigant who finds himself in a time-crunch situation like that Brooks was in when this appeal was brought.

The Court of Appeals overlooked or misapprehended the law in this regard and the aspects of the master's order that show that these issues are preserved; this resulted in an erroneous ruling by the Court of Appeals in this case. If the question of issue preservation on these points is a close one, the court should resolve that question in favor of preservation and reach the merits of the issues.

II. Brooks is correct on the merits of the issues the Court of Appeals found unpreserved.

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the

language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact." S.C. Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) (internal citations omitted).

It is well settled that ambiguous language in a contract document should be interpreted strongly in favor of the party who did not draft the document and against the party who did. E.g., So. Atlantic Financial Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003); Mid-Continent Refrigerator Co. v. Way, 263 S.C. 101, 109, 208 S.E.2d 31, 35 (1974). Any conflict between clauses in a contract must be resolved in favor of the non-drafting party. Mid-Continent Refrigerator, 263 S.C. at 109.

"The conduct of the parties is entitled to great weight in interpreting an ambiguous contract." Langston v. Niles, 265 S.C. 445, 458, 219 S.E.2d 829, 834 (1975). In cases of doubt, the interpretation of a contract that the evidence shows was shared by both parties to it is determinative. Kitchens v. Lee, 221 S.C. 59, 66, 69 S.E.2d 67, 69 (1952). "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." Stackhouse v. Pure Oil Co., 176 S.C. 318, 337, 180 S.E. 188, 196 (1935). The behavior of the parties to the contract in carrying it out is evidence that may speak to their mutual interpretation of the contract terms. Langston, 265 S.C. at 458 (in interpreting ambiguous terms, noting behavior of parties after agreement struck); Kitchens, 221 S.C. at 66 ("[t]he repeated payments by appellant and long-continued and unqualified acceptances by respondent are conclusive of their respective interpretations of the

terms of the contract, by which both are bound even if there were uncertainty as to the terms of the contract").

Here, the terms of the documents at issue show marked ambiguity about what payments Brooks was required to make under his settlement with First Citizens. First Citizens argued that Brooks "is in default of the note, mortgage, and forbearance agreement[,]" and the lower court found that, in addition to the forbearance payments of the initial $5,000.00 and the $1,500.00 monthly payments – which Brooks made – "[t]he forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit proper[.]" Paragraph 3 of the forbearance agreement, however, states that "Borrower shall comply with this agreement *in the following manner*" (emphasis added) and then lists five sub-items, one of which does not call for Brooks to do anything (item (c)), one of which does not apply at all (item (d), since this is not an escrowed loan), and one of which does not apply in the situation of this case (item (e)), since no evidence was presented that First Citizens incurred "any additional default and/or foreclosure costs . . . during the course of this Agreement." The only actually applicable obligations from this list of what Brooks is required to do to "comply with this agreement" are to pay the initial $5,000.00 payment and pay the $1,500.00 monthly payments through March 1, 2011. To the extent that there are provisions in the forbearance agreement that purport to require Brooks to make these payments *and* other payments under the note and mortgage, the controlling language is in Paragraph 3, which states Brooks is required to do only the things specifically enumerated in the list set out there in order to "comply with this agreement."

As quoted in First Citizens' brief, in construing a contract, "the parties' intention must be gathered from the contents of the *entire* agreement and not from

any particular clause thereof." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct. App. 2007) (emphasis added). Admittedly, there provisions in the forbearance agreement document from which one might argue, as First Citizens did, that Brooks was required to make the $1,500.00 monthly payments *as well as* the regular payments coming due under the note and mortgage. That, however, is only one interpretation of the ambiguous, inconsistent provisions of the document. For instance, the term "Payments" is not defined in the document. First Citizens ignores that paragraph 3 of the forbearance agreement states that "Borrower shall comply with this agreement *in the following manner*" (emphasis added) and then lists five sub-items, the only one of which that is actually applicable to this case, being that Brooks pay the initial $5,000.00 payment and pay the $1,500.00 monthly payments through March 1, 2011. That list does *not* state that the monthly payments due under the note and mortgage must also be paid.

"It is, of course, elementary that any conflict between [Paragraph 3] and any other provision of the contract documents would have to be resolved or construed in favor of [Brooks,]" the non-drafting party. Mid-Continent Refrigerator, 263 S.C. at 109.

Also, First Citizens stated in its brief that "[t]he Note and Mortgage had a maturity date of May 5, 2010 [which means that it came and went during the time the forbearance agreement document called for Brooks to make monthly payments] and, therefore, [Brooks] would have been in maturity default on the instruments by failing to pay the balance due on the debt by that date." If the loan matured on May 5, 2010, then Brooks would have been required to pay the entire balance of the loan on or before that date; thus, there would be no need to make *any* further payments beyond that, but monthly payments beyond that date, at least arguably in lieu of the payments

per the note and mortgage provisions, were exactly what the forbearance agreement called for.

The presence of these provisions in the same document presents an ambiguity. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then *a question of fact.*" S.C. Dept. of Natural Resources, 345 S.C. at 623 (internal citations omitted, emphasis added).

Further, the parties' course of performance of the settlement bears out that First Citizens and Brooks both construed the forbearance agreement as obligating Brooks to pay only the $5,000.00 initial payment and $1,500.00 monthly payments. Those are the payments Brooks made, and First Citizens accepted them without complaint. This is evidence that speaks to a shared interpretation of the contract terms by Brooks and First Citizens. Langston, 265 S.C. at 458; Kitchens, 221 S.C. at 66. Indeed, when First Citizens moved for summary judgment, the supporting affidavit it used did not state that Brooks was in default of the forbearance agreement for failure to make required payments.

This is an ambiguity that the law required the master to construe in favor of Brooks, the non-drafting party. By finding that "the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit[,]" the master construed the ambiguity in favor of First Citizens, the drafting party. This was reversible error. At the very least, there was a genuine issue of material fact regarding the construction of the forbearance agreement's terms in this regard.

The forbearance agreement does contain a term that states that "acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's

right to proceed with the foreclosure action." The forbearance agreement also contains other, inconsistent terms, however. Paragraph 1 of the document states that "Lender shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there exists no Event of Default[.]"

This, too, is an ambiguity that the law required the master to construe in favor of Brooks. So. Atlantic Financial, 356 S.C. at 447; Mid-Continent Refrigerator, 263 S.C. at 109. The master's finding that the forbearance agreement contained this term, without any findings about its ambiguity and inconsistency, was at best incomplete. This was error.

The Court of Appeals' opinion in this case is a decision that is wrong on the merits as well as wrong on the procedural law. The Court of Appeals' decision is not harmless error. This Court should reverse it.

III. The Court of Appeals' opinion ignores that the factual showing made by First Citizens in support of its summary judgment motion demonstrated that there is at least a genuine issue of material fact about whether Brooks withdrew his answer.

The Court of Appeals' opinion, though it does not state its analysis, strongly appears (from the parentheticals following the citations it contains) to be based on a belief that, to avoid summary judgment, Brooks was required to put some factual material into the record on the question of whether he violated the parties' agreement by failing to withdraw his answer. This is a misapprehension of the law and is reversible error. It ignores longstanding an logically sound summary judgment jurisprudence of this Court and in this state generally.

The forbearance agreement document at issue states quite plainly that Brooks "hereby withdraws its [sic] answer and defenses with prejudice[.]" This statement is contained in the forbearance agreement document attached to the affidavit that First Citizens served in support of its motion for summary judgment.

Under Rule 56, SCRCP, "the party seeking summary judgment has the initial responsibility of demonstrating the absence of any genuine issue of material fact." Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545-46 (1991). "The party seeking summary judgment has the burden of clearly establishing by the record properly before the court the absence of a triable issue of fact." Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992).

It is only "*when a motion for summary judgment is made and supported as provided in [Rule 56]*" that the non-movant is required to meet the motion with factual material that shows there is a genuine issue for trial. Rule 56(e), SCRCP (emphasis added). "A party who fails to show the absence of genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials." Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990).

First Citizens did not meet its initial burden of demonstrating the absence of a material fact on this point. In fact, the factual showing it made in support of its motion demonstrated the existence of an issue of material fact. Brooks did not have to submit still more material on this point to argue that First Citizens was not entitled to summary judgment on this question. See id.

Where an agreement between parties is embodied in more than one document, as here, the documents are considered as a whole and construed together. E.g., Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977).

When the settlement agreement document and the forbearance agreement document are construed together, they show at least an ambiguity about whether Brooks withdrew his answer by signing the forbearance agreement document. That is an issue of fact that is material to whether summary judgment on this point was proper. The law is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law[,]" Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986), and that "[e]ven when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied[,]" Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). There was at least a genuine issue of material fact here, and summary judgment on this point should have been denied. It was error for the Court of Appeals to affirm the grant of summary judgment on this point. First Citizens' own showing revealed it was not entitled to summary judgment on this issue.

Brooks respectfully submits that the Court of Appeals overlooked or misapprehended the law and the record in this regard and erred in its decision. This Court should reverse the Court of Appeals.

WHEREFORE, the Petitioner prays for an Order granting a writ of certiorari to review the final decision of the Court of Appeals in this case.

Respectfully submitted,

Andrew S. Radeker
S.C. Bar No. 73743
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner

September 24, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Common Pleas Case No. 2009-CP-43-2538
Court of Appeals Case No. 2013-000255

First Citizens Bank and Trust Company, Inc.,.....Respondent,

v.

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T. Brooks, III, is.....Petitioner.

PROOF OF SERVICE

I certify that I served the foregoing Petition for Writ of Certiorari and Memorandum in Support on the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Damon C. Wlodarczyk, Esq.
Riley Pope & Laney, LLC
P.O. Box 11412
Columbia, SC 29211

September 24, 2014

Respectfully submitted,

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
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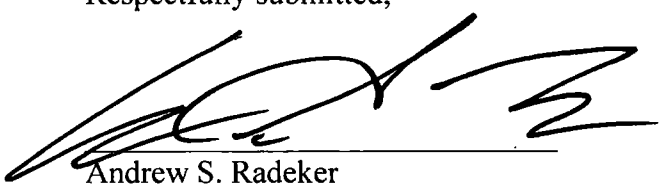
PROOF OF SERVICE

I certify that I served the Appendix on the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Damon C. Wlodarczyk, Esq.
Riley Pope & Laney, LLC
P.O. Box 11412
Columbia, SC 29211

September 24, 2014

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner