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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Civil Action No. 2013-CP-15-1023
Appellate Case No. 2014-000661

James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon ..... Appellants,

v.

U.S. Bank National Association, U.S. Bank National Association ND, Palmetto Property Conservation, and Mark Brown.....Defendants,

of whom

U.S. Bank National Association and U.S. Bank National Association ND are..... Respondents

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INITIAL REPLY BRIEF OF APPELLANTS

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1. Introduction

U.S. Bank's brief paints it as a victim of sharp litigation tactics and urges the court to prevent the Kincannons from obtaining a "windfall." The only party employing sharp litigation tactics is U.S. Bank, whose lawyers proposed a "mutual" stipulation of dismissal with prejudice to kill the Kincannons' wrongful foreclosure claims even though U.S. Bank had no intention of abandoning any of their claims against the Kincannons.

Also, the only party seeking a windfall is U.S. Bank. U.S. Bank's position is that its claims should survive a stipulation of dismissal with prejudice but the Kincannons' claims should not. Meanwhile, the Kincannons take the unremarkable position that both sides' claims were extinguished by a *mutual* stipulation of dismissal with prejudice.

Asking a court to enforce the mutuality of a mutual release is not asking for a windfall, nor are the Kincannons seeking the dreaded "free house" often sought (and sometimes obtained) in mortgage litigation. The Kincannons paid their debt in full to U.S. Bank by abandoning wrongful foreclosure claims, choses in action whose value could easily exceed any debt the Kincannons owed to U.S. Bank.

U.S. Bank proposed a mutual stipulation of dismissal with prejudice of all claims either side had against the other. The Kincannons agreed. Now U.S. Bank claims that it bought peace on the Kincannons' wrongful foreclosure claims without actually paying anything. It is U.S. Bank who seeks a windfall, not the Kincannons.

The court must decline U.S. Bank's invitation to rewrite a mutual stipulation of dismissal with prejudice so that it is not mutual. Beyond that, U.S. Bank's brief contains numerous other serious errors and misstatements, addressed below in reply.

2. U.S. Bank's Brief Relies on Facts Outside the Complaint

U.S. Bank's entire argument and theory of the case—which was erroneously adopted by the trial court—is that every time the Kincannons miss another monthly payment, a new default occurs that U.S. Bank can sue over. None of the facts in the Complaint support the idea that any monthly payments will ever be due after July 13, 2013, the date the entire debt became due to U.S. Bank's acceleration. U.S. Bank prevailed on a Rule 12(b)(6) motion even though U.S. Bank's argument relies on contested facts that are not within the Complaint and are contrary to the Complaint.

The facts alleged in the Complaint are that U.S. Bank told the Kincannons by letter that the only way regular monthly payments would ever become due again after acceleration is if the Kincannons exercised their right to reinstatement under the terms of the mortgage by, among other things, making all the past due payments. But the Complaint alleges—and U.S. Bank agrees, per its brief—that no payments of any kind have been made since April of 2013.

Because the Kincannons have not exercised any right to reinstatement, no regular monthly payments have come due since the July 13, 2013 acceleration. This means that U.S. Bank's entire theory of the case, the theory that propelled it to a 12(b)(6) victory before the trial court, is based on facts that do not appear in the Complaint. In fact, U.S. Bank's theory of the case depends on facts that are directly contrary to the facts alleged in the Complaint. U.S. Bank's argument rests entirely on the idea that future monthly payments are coming due and being missed, but that is not what the Complaint alleges.

The Complaint alleges that the last payment the Kincannons missed is the last payment the Kincannons will ever miss: a payment on July 13, 2013 for the full amount

of the note. This is a well-pleaded factual allegation. It arises from a written acceleration notice U.S. Bank sent to the Kincannons saying exactly that, and that notice is quoted in the Complaint. U.S. Bank's acceleration notice of June 12, 2013 states that the only way monthly payments would again be due after acceleration would be if *the Kincannons*, not U.S. Bank, exercised their right to reinstatement.

Counsel for the Kincannons gave a detailed explanation at the hearing on U.S. Bank's Rule 12(b)(6) motion that the monthly payment obligation never resumed in this case after the acceleration of July 13, 2013. Transcript Page 13 Line 7 through Page 14 Line 5. The trial judge asked U.S. Bank's counsel about the issue, since the argument U.S. Bank presented did not match the facts asserted in the Complaint, and U.S. Bank's counsel conceded that there were no factual allegations in the Kincannons' Complaint that supported her theory of new defaults arising from missed payments after the stipulation of dismissal in October of 2013:

> COURT: Ms. Baker, my question is, is there an allegation that we have default in the pleadings both before the dismissal with prejudice, as well as after the dismissal with prejudice? Have you been able to locate it from your review of the pleadings?
> MS. BAKER: I am trying to look at that and I thought - - let's see here. There were allegations of default in July of 2012 [sic: 2013], but I don't see any allegations in between on this until October of 2013.
> THE COURT: October of 2012 was the dismissal with prejudice, Ms. Baker?
> MS. BAKER: 2013.
> THE COURT: 2013.
> MS. BAKER: Yeah, it was right ---
> THE COURT: And you're telling me that there has been default subsequent to October of 2013, but that's not alleged in the pleadings; is that correct?
> MS. BAKER: I don't see it; that's the way I'm looking at it right now. I see where we filed a motion to dismiss, so it wouldn't be in anything that we submitted. I don't see it in any allegations in the complaint. This, I think, we're here today trying to dismiss that there is a default in here.

Transcript Page 8 Line 4 through Page 8 Line 12.

The trial judge asked counsel for the Kincannons about the matter, and counsel for the Kincannons explained that there was only one default in the case, occurring as a result of the April 30, 2013 repudiation, and a continuous state of default thereafter with no "new default" as alleged by U.S. Bank. Counsel for the Kincannons could not have been clearer on this: "In this case[,] any future lawsuit [by U.S. Bank against the Kincannons for foreclosure or debt collection] would automatically go back to the April 30th repudiation, which they can never sue for again." Transcript Page 14 Lines 20-22.

The transcript indicates that the trial judge made the error in this case because U.S. Bank's counsel presented facts outside the Complaint—the "new defaults" theory. U.S. Bank's counsel admitted at the hearing that the facts underlying this theory were outside the Complaint, but the trial judge mistakenly thought counsel for the Kincannons conceded the point in response to a contradictory question by the judge. The trial judge called time on Kincannon's counsel mid-sentence as he was trying to explain that he had not made a concession and entirely disagreed with U.S. Bank's position.[1]

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[1] The trial judge asked counsel for the Kincannons a contradictory question that has confused the record a bit. The trial judge asked counsel for the Kincannons for a concession that opposing counsel's ongoing default theory was correct. Counsel for the Kincannons conceded that the ongoing default theory was correct but was unable to explain to the trial judge that that theory was the *Kincannons' theory*, not U.S. Bank's theory, prior to the judge calling time seconds later. What appears at first blush to be a concession by counsel for the Kincannons is not.

U.S. Bank's theory is that each newly missed payment is a discrete, new default. The Kincannons' theory is that there has been only one default and will only ever be one default, that this led to a continuous *status* of ongoing default which means that no new defaults can occur, and that any new lawsuit by U.S. Bank alleging a "new" default will always be traced back to the April 30, 2013 repudiation which led to the July 13, 2013 acceleration. The trial judge's question to counsel for the Kincannons was whether the *status* of default was ongoing, not whether there were new, discrete defaults occurring

U.S. Bank's brief presents a state of facts that do not appear in the Complaint. U.S. Bank's argument before the trial court had the same flaw. This improper presentation of material outside the Complaint—which U.S. Bank's counsel admitted to at the hearing—is the proximate cause of why the trial court ruled erroneously.[2] U.S. Bank's argument based on facts outside the Complaint caused the trial judge to wrongly believe that the Kincannons were "re-defaulting" every month when the Complaint alleges no such thing.

Counsel for U.S. Bank admitted at the hearing that U.S. Bank's Rule 12(b)(6) argument depended on facts outside of the Complaint. The trial court likely only ruled for U.S. Bank because the judge erroneously thought counsel for the Kincannons conceded those facts as true. The Kincannons' counsel only conceded that the Kincannons had been

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every month. It would seem that Judge Buckner erroneously concluded that the Kincannons conceded the factual claims by U.S. Bank's counsel when they did not and do not make any such concession.

[2] The introduction of factual allegations outside the Complaint (and contrary to the Complaint) by U.S. Bank's counsel was especially problematic in light of the fact that U.S. Bank's counsel failed to provide the grounds for its motion in advance of the hearing. While the Kincannons were not prejudiced in the sense that their counsel was able to cover everything at the hearing and by way of a motion to reconsider, a substantial amount of the hearing consisted in counsel for U.S. Bank, counsel for the Kincannons, and Judge Buckner talking past each other. The reason for this was that nobody had any idea what anyone else was going to argue before the hearing because U.S. Bank kept it a secret until the hearing. A proper Rule 12(b)(6) motion explains the *basis* for the contention that the complaint fails to state facts sufficient to constitute a cause of action.

The effect of U.S. Bank's failure to give notice to the trial court or to the Kincannons as to what they planned to argue at the hearing turned the hearing into a trial-by-ambush affair not unlike a magistrate's court case. The basic claim in this lawsuit is worth one-third of a million dollars, and U.S. Bank contends the outcome of this case has serious public policy implications. A case of this nature should not have been decided in a brief trial-by-ambush hearing where counsel for the plaintiffs had lost before he even had a chance to finish his argument.

in a constant state of default on the loan since April 30, 2013. Counsel for the Kincannons did **not** concede that any new defaults had occurred since then. The facts alleged in the Complaint conflict with the theory on which U.S. Bank prevailed.

U.S. Bank's argument is not proper in the Rule 12(b)(6) context because—as U.S. Bank's counsel admitted at the Rule 12(b)(6) hearing—U.S. Bank's position relies on facts outside of the Complaint. U.S. Bank is welcome to plead and attempt to prove its factual allegations that certain payments came due on the Kincannons' loan after the acceleration on July 13, 2013 and after the stipulation of dismissal with prejudice on October 21-22, 2013. U.S. Bank is welcome to plead and attempt to prove its factual allegations that the Kincannons have failed to make these payments.

Once U.S. Bank has alleged these facts in a pleading—not in a demurrer—then U.S. Bank can make the legal argument that the Kincannons' failure to make some newly due payment (whatever it may be) constitutes a new default. U.S. Bank can also make the legal argument that this hypothetical new default permits U.S. Bank to sue the Kincannons without the res judicata bar created by U.S. Bank's stipulation of dismissal with prejudice on October 21-22, 2013 of claims arising out of prior defaults.

The trial court's order dismissing the Kincannons' claims is entirely premised on holdings of courts from other jurisdictions that res judicata does not bar the holder of a note and mortgage from instituting a new foreclosure or debt collection action over *subsequent and separate defaults*. Order at 3. The problem with the trial court's order is that the Complaint does not make any allegation that there have been or will be any subsequent and separate defaults. These factual allegations came from U.S. Bank's counsel, not from the Complaint.

As counsel for the Kincannons stated at the hearing, the Complaint alleges that only one default ever occurred, the Kincannons' repudiation of April 30, 2013, and that the Kincannons' obligations to U.S. Bank have been in a continuous, ongoing state of default ever since. The trial court's order simply does not apply to the facts in Plaintiffs' Complaint.

U.S. Bank has not put forward one single argument as to why it should win the Kincannons' case as actually pled in the Complaint. This entire time, U.S. Bank has been arguing against a strawman version of the Kincannons' case created entirely by U.S. Bank, not the Kincannons' *actual* case. U.S. Bank convinced the trial court to rule against their strawman version of the Kincannons' case, but U.S. Bank did not convince the trial court to dismiss the Kincannons' case that actually appears in the Complaint.

All the Kincannons request at this juncture is that the Court of Appeals modify the trial court's order so that it is a dismissal without prejudice. The Kincannons will refile a new complaint that explicitly alleges as a matter of fact that no payments have come due after July 13, 2013 or will ever come due based on U.S. Bank's representations to the Kincannons and based on the terms of the loan documents. U.S. Bank is welcome, of course, to refile a Rule 12(b)(6) motion, but this time it will have to be based on the Kincannons' actual complaint rather than a version of facts contrary to the complaint.

When a Rule 12(b)(6) dismissal with prejudice is appealed and the appellant proposes to file a new complaint that includes factual allegations curing whatever problems the trial court identified, the appellate court should alter the dismissal to being without prejudice and be done with the matter. That is the remedy the Kincannons seek. Alternatively, of course, the Kincannons maintain the position that they should prevail on

the substantive matters in the appeal. But if the Court of Appeals is inclined to simply alter the dismissal to be without prejudice and remand, the Kincannons prefer that remedy.

"When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice." Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). "The plaintiff in most cases should be given an opportunity to file and serve an amended complaint." Id.

> When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice[.] An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted.

Id. at 130, 628 S.E.2d at 881-82.

Further, under South Carolina case law, an order granting a dismissal for failure to state a cause of action is necessarily without prejudice even if it appears not to be. As our Supreme Court held in Sealy v. Dodge:

> Appellants' failure to timely amend their original complaints or appeal the sustaining of respondents' demurrers properly resulted in dismissal. *Brown v. Easterling*, 59 S.C. 472, 38 S.E. 118 (1901). Dismissal, however, does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint. *See Hennegan v. Atlantic Coast Line R. Co.*, 211 S.C. 357, 45 S.E.2d 331 (1947) [plaintiff can commence subsequent action after dismissal for failure to state a cause of action]

289 S.C. 543, 544, 347 S.E.2d 504, 505 (1986).

3. U.S. Bank's Brief Accidentally Concedes the Error of the Trial Court's Ruling

U.S. Bank's brief cites cases saying that sometimes res judicata forbids future foreclosure actions after a prior dismissal with prejudice and sometimes res judicata does not forbid a future foreclosure action after a prior dismissal with prejudice. This is exactly what the Kincannons argued *unsuccessfully* in the trial court:

> THE COURT: [Is it] your position, Mr. Kincannon, that if the bank dismisses a foreclosure action with prejudice, that it nullifies the note and mortgage?
> MR. KINCANNON: Your Honor, actually my position is that it depends.
> THE COURT: I see.
> MR. KINCANNON: It depends . . . very much on the facts of the case. The vast majority of mortgage foreclosure cases that are dismissed are dismissed because the borrower had resumed making payments . . . pursuant to some sort of an agreement.
> THE COURT: And isn't that exactly what happened in your case, that there was some sort of – the banks have different names for it; not loan foregiveness, but a reorganization or a modification or something of that nature.
> MR. KINCANNON: Actually, no Your Honor.

Transcript at Page 9 Lines 20 Page 10 Lines 13.

U.S. Bank's position in the trial court was that the Kincannons are categorically barred from arguing that res judicata would apply in any future case. Yet U.S. Bank's brief and—just as importantly—the trial court's order both cite cases stating that the res judicata issue is a case-by-case determination, exactly what the Kincannons argued and exactly the opposite of what U.S. Bank argued and prevailed on.

Nothing in the trial court's order and nothing in U.S. Bank's brief explains how the facts of this particular case work in the res judicata analysis. U.S. Bank just states that sometimes res judicata doesn't bar successive foreclosure suits and then states that the Kincannons should ipso facto lose this lawsuit. Neither U.S. Bank nor the trial court provided any analysis whatsoever as to whether the Kincannons' situation is the sort of

situation where res judicata would apply or would not apply. This by itself mandates reversal or alteration to dismissal without prejudice.

Both U.S. Bank's argument and the trial court's order rely purely on sleight-of-hand by citing cases saying that res judicata *sometimes* permits successive foreclosure actions but then concluding that the Kincannons' action should be barred because res judicata *always* permits successive foreclosure actions. The trial court's order itself is amazingly inconsistent on this issue: it cites cases from other jurisdictions saying that res judicata sometimes permits successive foreclosure actions and then concludes that U.S. Bank can file a successive foreclosure action without explaining why, other than to rely on U.S. Bank's outside-the-pleadings factual claims that separate-and-subsequent defaults *will* occur at some point in the future (again, without explaining why).

South Carolina law is clear that upon acceleration of the entire debt, U.S. Bank could not dismiss its debt collection claim with prejudice and still expect the claim to survive absent a collateral agreement with the Kincannons to that effect. U.S. Bank's brief claims that it is hornbook law that U.S. Banks should win this case. Actually, it is *literally* hornbook law that the Kincannons should win. The South Carolina Supreme Court's case of Mitchell v. Federal Intermediate Credit Bank of Columbia, 165 S.C. 457, 164 S.E. 136 (1932) is to this day a leading case on the prohibition against claim splitting that often appears in civil procedure curricula. The Mitchell case indicates that U.S. Bank's prejudicial dismissal of a ripe debt collection counterclaim for the full accelerated balance of the debt—a fact that is undisputed by U.S. Bank—means U.S. Bank cannot ever bring a debt collection claim against the Kincannons again.

Obviously, if a prior foreclosure case is dismissed with prejudice and the dismissal is accompanied by a collateral agreement by the debtor to resume payments, res judicata will not bar a subsequent foreclosure action based on a new default. This is obvious. U.S. Bank argues this point repeatedly and correctly. Unfortunately for U.S. Bank, that has absolutely nothing to do with this case. The Kincannons did *not* agree to resume payments when U.S. Bank stipulated to the dismissal with prejudice of its claims. In fact, the Kincannons' repudiation of all future payment obligations was still in force and had never been retracted (and still has not been retracted) when U.S. Bank dismissed its claims with prejudice.

U.S. Bank's authorities all stand for the proposition that a debtor should not be able to reach an accord and satisfaction with a creditor on an installment debt as part of a litigation settlement, then use the dismissal of the litigation as a res judicata defense to future enforcement in the event of future missed payments. The cases that hold this are correctly decided, but U.S. Bank's efforts to apply them to this case—and the trial court's decision as a matter of law to apply them to this case—is completely wrongheaded. There was no collateral agreement to resume payment. That is an outcome-determinative factual distinction between the authorities U.S. Bank and the trial court relied upon and the actual facts of this case.

U.S. Bank's position leads to absolutely nonsensical outcomes in situations where a foreclosure action is dismissed with prejudice because the court finds the entire obligation is unenforceable. Suppose a court dismissed a bank's foreclosure case with prejudice finding the note and mortgage were invalid under Wachovia Bank v. Coffey, 398 S.C. 76, 698 S.E.2d 244 (Ct. App. 2010) (holding that certain illegal conduct by the

holder or originator of a note and mortgage may render the debt uncollectible) or Matrix Financial Services Corp. v. Frazier, 394 S.C. 134, 714 S.E.2d 532 (2011) (same). According to U.S. Bank's argument, that bank can just refile the case over and over every month for the duration of the repayment period hoping for a different result in the trial court. This is exactly what U.S. Bank is arguing and it simply does not make sense.

In this case, the Kincannons preemptively asserted in pleadings an unclean hands defense to argue that the note and mortgage were wholly invalid. U.S. Bank's dismissal with prejudice of its foreclosure and debt collection counterclaims permanently binds U.S. Bank to the Kincannons' unclean hands defense to the entirety of the obligation. This case does not involve the mere dismissal with prejudice of a foreclosure action—it involves the dismissal with prejudice of a foreclosure action in the face of an unclean hands defense asserting the note and mortgage were both invalid under an illegality theory very similar to that in the Wachovia-Matrix line of cases. (If closing a loan with a non-attorney invalidates a note and mortgage, surely illegal ouster of a borrower from their property *might* invalidate a note and mortgage. Res judicata bars U.S. Bank from relitigating that issue.)

U.S. Bank's attempt to argue U.S. Bank v. Gullotta, 899 N.E.2d 987, 991 (Ohio 2008) is inapplicable to this case is based on yet another factual misstatement by U.S. Bank. U.S. Bank's brief appears to indicate (the section is confusing) that the dismissal with prejudice in this case occurred alongside a mortgage modification that the Kincannons agreed to. This is just plain false. There *was* a previous mortgage modification, but it had absolutely nothing to do with the stipulation of dismissal with prejudice and occurred prior to the Kincannons' repudiation and default and prior to any

events relevant to this appeal. U.S. Bank's efforts to use this prior modification in an effort to distinguish this case from U.S. Bank v. Gullotta are inappropriate because they rely on (yet another) misrepresentation to the court about the facts of the case.

The U.S. Bank v. Gullotta case proves that U.S. Bank is on actual notice that dismissals with prejudice can be fatal to future foreclosure efforts, something that should be obvious. U.S. Bank concedes that there is no case directly on point on this issue in South Carolina. Given this, U.S. Bank's decision to use a dismissal with prejudice in this case was nothing but a gamble. U.S. Bank had no idea whether South Carolina courts would follow U.S. Bank v. Gullotta or not, and cases like Mitchell v. Federal Intermediate Credit Bank of Columbia, 165 S.C. 457, 164 S.E. 136 (1932) are highly adverse to U.S. Bank's position and suggest South Carolina would be even more favorable to the Kincannons' position than Ohio was to Gullotta's. There is no logical way this case can be distinguished from Mitchell or from Gullotta so as to permit a ruling for U.S. Bank, and Mitchell is binding precedent.

All U.S. Bank had to do was state that it wanted to dismiss its claims without prejudice. In that situation, the Kincannons would never have agreed to a stipulation of dismissal at all, the first Kincannon v. U.S. Bank case would have continued, and this appeal would never have happened. Having already lost at least one case exactly like this one, U.S. Bank knew first-hand that dismissing foreclosure and debt collection claims with prejudice could invalidate a note and mortgage, something that is obviously possible to anyone with even a passing familiarity with the law of res judicata. Yet U.S. Bank dismissed its claims with prejudice anyway. U.S. Bank now quixotically argues that the Kincannons are trying to destroy the law of mortgages in South Carolina merely by

arguing that U.S. Bank's arguments in this case should meet the same fate that they met in an identical case from Ohio.

U.S. Bank knocks the Kincannons for citing only one case in their brief, but sometimes only one case is necessary. All of U.S. Bank's citations involve cases where there was some subsequent and separate default. The Kincannons' citation involves a case identical to this one that has the unique feature of being a case U.S. Bank lost in another jurisdiction. While this reply brief contains a few more case citations, only one is needed to refute the arguments in U.S. Bank's brief: Mitchell v. Federal Intermediate Credit Bank of Columbia, 165 S.C. 457, 164 S.E. 136 (1932). So long as Mitchell remains good law, a party that dismisses a debt collection claim for the full amount of the debt with prejudice and does not procure a collateral agreement with the debtor to resume payments has lost the ability to collect the debt or any part of the debt for all time.

The U.S. Bank v. Gullotta case establishes why U.S. Bank must lose this case from the standpoint of foreclosure law. The Mitchell case establishes why U.S. Bank must lose this case from the standpoint of debt collection law. U.S. Bank cites numerous cases having facts totally unlike this one and calls it a "wealth of case law." There are very few cases with facts even remotely like this case because banks do not ordinarily engage in litigation strategies that are as reckless as U.S. Bank's strategy. Probably because most banks employ sensible litigation strategies (unlike U.S. Bank), the Kincannons have not located a single case with facts *exactly* like this one in the entire country, published or unpublished.

Yet the Kincannons' two main citations are directly on point and precisely establish why U.S. Bank must lose. Sometimes legal issues are so straightforward that

they do not require string-cites of dozens of cases, even though they arise in unusual contexts. Though the facts of this case are a bit exotic, the application of res judicata could not be more straightforward. U.S. Bank dismissed a foreclosure and debt collection claim with prejudice in the face of an unclean hands defense going to the enforceability of the entire obligation. No collateral agreement was reached with the Kincannons to resume payment, and the dismissal with prejudice occurred after the Kincannons had refused to ever make another payment. If res judicata does not bar U.S. Bank from relitigating these issues in future cases, then res judicata simply does not apply at all in foreclosure cases, and that is a result that even U.S. Bank concedes is not the law.

4. U.S. Bank's Brief Makes Incorrect Claims About Public Policy

If Plaintiffs win this case, U.S. Bank claims that it will upset the law of mortgage foreclosure in South Carolina such that banks will no longer negotiate with debtors in default. U.S. Bank predicts other dire consequences, none of which will come true.

This is a highly idiosyncratic case. A bank engaged in wrongful foreclosure activities against a mortgage foreclosure defense lawyer. The bank illegally broke into the property and changed the locks even though the payments were current and the note and mortgage were not in default. After a wrongful foreclosure lawsuit was filed against the bank, the bank failed to file a timely answer and failed to file a counterclaim at all. The bank then stipulated to the dismissal with prejudice of its un-filed counterclaims because otherwise the plaintiffs would not stipulate to the dismissal of their claims. Now the bank wants the plaintiffs to be stuck with their prejudicial dismissal of claims, but the bank argues that its claims should survive the *mutual* prejudicial dismissal.

Plaintiffs have not asked the court for any sort of wild relief. A bank that prejudicially dismisses a foreclosure cause of action and a debt collection cause of action for the full amount of the debt cannot assume that those claims will survive. U.S. Bank has not cited a single case that categorically exempts banks from the standard application of res judicata or exempts banks from res judicata on facts like those in this case. The only case cited by either party with facts close to the facts of this case is the U.S. Bank v. Gullotta case in which U.S. Bank lost this very same argument. And presumably the mortgage lending industry hasn't pulled out of Ohio in light of U.S. Bank v. Gullotta.

There are numerous things U.S. Bank could have done to avoid this outcome. U.S. Bank could have avoided engaging in sketchy, illegal wrongful foreclosure activities against a foreclosure defense lawyer and his family. U.S. Bank could have filed a timely answer with compulsory counterclaims in the first Kincannon v. U.S. Bank action. U.S. Bank could have learned its lesson from the U.S. Bank v. Gulotta case in Ohio and not stipulated to the dismissal with prejudice of its ripe claims for foreclosure and debt collection.

This Court should not rewrite the law of res judicata in South Carolina to exempt mortgage lenders and banks from the consequences of their foolish litigation decisions. There is absolutely no good reason why a bank that dismisses with prejudice a claim for the full, accelerated amount of a debt should expect any part of that claim to remain alive outside of an agreement with the debtor to that effect.

U.S. Bank is correct, however, that this ruling could affect public policy. A ruling for U.S. Bank would cast doubt upon the finality of a great many prejudicial dismissals in South Carolina. A ruling for U.S. Bank would also destroy the idea that a settlement

agreement (which a mutual stipulation of dismissal is) is a contract. Ambiguities in a contract are supposed to be construed against the drafter, and U.S. Bank drafted the stipulation of dismissal with prejudice.

A ruling for U.S. Bank would open the door for unscrupulous parties to propose "mutual" stipulations of dismissal with prejudice in cases where both sides have claims, but the unscrupulous party could try to structure its claims so as to survive the stipulation of dismissal in a way similar to U.S. Bank's efforts in this case. If a mutual stipulation of dismissal with prejudice of all claims brought or which could have been brought does not operate to release all claims between the parties, then it will be very hard to understand how any South Carolina attorney faced with a client who has buyers' remorse over a stipulation of dismissal with prejudice can do anything other than just refile the case.

5. The Kincannons Did Not Engage in "Procedural Jockeying"

U.S. Bank's brief claims the Kincannons engaged in "procedural jockeying" and should not be permitted to prevail because of that. First of all, the idea that there is something wrong with winning a case as a result of "procedural jockeying" is beyond ridiculous. Litigants win cases all the time because their lawyer outmaneuvered the other lawyer on an issue of procedure. There is nothing shameful about this—a party whose lawyer is outmaneuvered in such a fashion and loses a case that should otherwise have been won should sue their lawyer for malpractice.

That being said, the Kincannons did not engage in any "procedural jockeying." ***U.S. Bank proposed the mutual stipulation of dismissal with prejudice.*** All the Kincannons did was sign what U.S. Bank sent them. If U.S. Bank's mutual stipulation of dismissal with prejudice kills U.S. Bank's right to sue on the note and mortgage—as it

should—then U.S. Bank did not lose because the Kincannons did something shady. U.S. Bank lost because it proposed a mutual release of all claims when U.S. Bank secretly intended to retain its claims.

The Kincannons' expectation and demand that a mutual stipulation of dismissal with prejudice actually have the effect of dismissing both sides claims is not "procedural jockeying." The very idea is patently ridiculous. The Kincannons did not outmaneuver U.S. Bank in this litigation. Just like in the Gullotta case, U.S. Bank outmaneuvered themselves with their own bizarre and incompetent litigation strategy. The Mitchell case indicates quite clearly that when a litigant shoots himself in the foot in a case like this, the courts cannot rescue that litigant from his own poor choices.

6. U.S. Bank's Brief Does Not Argue Certain Points

U.S. Bank's brief presents no counterargument that the Kincannons can locate against the Kincannons request that the Court of Appeals modify the dismissal to be a dismissal without prejudice, and U.S. Bank's brief plainly concedes that there are factual scenarios where res judicata does bar a successive foreclosure action. Nor can the Kincannons locate any argument from U.S. Bank on the points raised in the Kincannons' brief that the trial court entirely failed to consider arguments put forward by the Kincannons arising out of the UCC and other law.

The Kincannons take the position that U.S. Bank's failure to argue these points in their brief should be deemed a concession and the Court of Appeals should at the very least modify the dismissal to be without prejudice as to the matters within the order and reverse the dismissal as to matters not within the order. Alternatively, simply modifying the dismissal to be without prejudice would resolve the entire matter because the

Kincannons would simply file a new complaint making all manner of factual allegations contrary to the facts U.S. Bank has been allowed to improperly assert in this matter at the Rule 12(b)(6) stage.

CONCLUSION

Appellants respectfully request this Honorable Court reverse the trial court's order or modify it to be a dismissal without prejudice. So long as Appellants have the right to refile under any such dismissal, Appellants prefer that remedy because it allows Appellants to file a clean complaint making factual allegations contrary to those improperly inserted in this case by U.S. Bank.

Respectfully submitted,

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