THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Common Pleas Case No. 2009-CP-32-506
Appellate Case No. 2014-001686

Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP,...............................Respondent,

v.

Elisabeth Orvin and Randy J. Elrod, Defendants,

Of whom Elisabeth Orvin is the..Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Did the lower court err in granting summary judgment where the Respondent's motion stated no grounds and was not served with any factual material in support of the motion?

II. Did the lower court err in granting summary judgment based on findings that the Appellant did not name certain witnesses in discovery (when she did), did not take those friendly witnesses' depositions, and that "[t]here is absolutely no indication that the six declarants would be available to testify at trial[?]"

III. Did the lower court err in granting summary judgment based on a conception that sworn declarations offered in opposition to the motion "are inadmissible hearsay[?]"

IV. Did the lower court err in granting summary judgment based on a conception that misconduct by a lender toward a borrower cannot ever satisfy the public interest element of an Unfair Trade Practices Act claim and that this "is a mere breach of contract case[?]"

V. Did the lower court err in making its decision on the basis of settlement negotiations that are inadmissible under Rule 408, SCRE?

STATEMENT OF THE CASE

The Appellant, Elisabeth Orvin, formerly known as Elisabeth Elrod (hereinafter "Ms. Orvin"), fell behind on her mortgage payments and was sued for foreclosure by the Respondent, Bank of America, N.A. (hereinafter "Bank of America")'s predecessor in interest, Countrywide Home Loans Servicing, LP, in 2009. (R. pp. ___; Summons and complaint.) Ms. Orvin did not serve a responsive pleading within 30 days of being served with the summons and complaint in this foreclosure action. The case was referred to the Lexington County master-in-equity.

Also in 2009, Ms. Orvin applied for and was approved for a trial period plan for a modification of the loan subject of this foreclosure case, and she successfully completed that plan. (R. pp. ___; affidavit of Elisabeth J. Elrod & attachments; deposition of Bank of America.) Bank of America sent Ms. Orvin a permanent modification package for her to complete, and, as Bank of America's 30(b)(6) deponent later testified, Ms. Orvin did everything she needed to do to accept Bank of America's offer of a permanent modification. (R. pp. ___; deposition of Bank of America.) At no time before Ms. Orvin accepted the offer of a modification did Bank of America withdraw that offer. (R. pp. ___; deposition of Bank of America.)

Bank of America, however, did not implement the modification internally and took no steps to dismiss the foreclosure action. (R. pp. ___; affidavit of Elisabeth J. Elrod & attachments; deposition of Bank of America; deposition of Ms. Orvin.) After making many months of payments at the amount called for in the modification, which Bank of America accepted, Ms. Orvin retained counsel and moved to set aside her default in the foreclosure action. (R. pp. ___; affidavit of Elisabeth J. Elrod &

attachments; motion to set aside default; additional affidavit of Elisabeth Orvin.) Served with the motion was an answer and counterclaim that asserted defenses to the foreclosure action and counterclaims for a) violation of the South Carolina Consumer Protection Code by engaging in unconscionable debt collection practices with regard to the loan at issue, b) violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "the SCUTPA") c) breach of contract, d) breach of contract accompanied by fraudulent act, e) defamation (libel), f) conversion, g) violation of S.C. Code Ann. § 37-10-102, and h) violation of the Fair Credit Reporting Act. (R. pp. ___; answer and counterclaim.) Not long after that motion was served, Bank of America began rejecting Ms. Orvin's payments. (R. pp. ___; additional affidavit of Elisabeth Orvin.)

The master issued an order setting aside Ms. Orvin's default and treating her answer and counterclaim as timely. (R. pp. ___; order setting aside default.) The parties conducted discovery. Bank of America moved for summary judgment, and, later, Ms. Orvin made a motion for partial summary judgment. (R. pp. ___; Bank of America's motion for summary judgment; Ms. Orvin's motion for summary judgment.) Ms. Orvin served factual material in support of her motion at the time she served the motion, in addition to affidavits by her that were already in the record. Among that material served in support of her motion were the transcripts of her deposition and of Bank of America's designee pursuant to Rule 30(b)(6), SCRCP. (R. pp. ___; deposition of Bank of America; deposition of Ms. Orvin.) Ms. Orvin's affidavits stated numerous instances of her pointing out to Bank of America employees the existence of her July 2009 modification and Bank of America's

consistent failure to acknowledge the validity or existence of that modification, including Bank of America's continued reporting to credit reporting agencies that the subject loan was delinquent despite the modification payments being made. (R. pp. ___; all affidavits of Ms. Orvin.)

The material served in support of Ms. Orvin's motion also included declarations of witnesses (former employees of Bank of America and affiliated companies), filed in an action then pending in the United States Court for the District of Massachusetts, that stated Bank of America engaged in a calculated, repeated practice, on a mass scale, in which it deliberately frustrated efforts of borrowers to obtain modifications and deliberately failed to implement both trial period and permanent modifications. (R. pp. ___; declarations.) Ms. Orvin named these declarants as witnesses to the facts of this case and provided a copy of the declarations to Bank of America's counsel in supplemental interrogatory responses and responses to requests for production she sent to Bank of America's counsel before she served her motion for summary judgment. (R. pp. ___; supplemental discovery responses.)

Bank of America did not serve anything in support of its summary judgment motion at the time the motion was made and served nothing in support of it until the Friday afternoon before the Tuesday on which the motions were heard. (R. pp. ___; Bank of America's motion for summary judgment; Bank of America's memorandum in support of summary judgment.)

At the motions hearing, Ms. Orvin withdrew her claim that Bank of America violated the South Carolina Consumer Protection Code by engaging in

unconscionable debt collection practices (because the loan at issue is a first-priority mortgage loan that is not subject to S.C. Code Ann. § 37-5-108), and Bank of America withdrew its motion for summary judgment as to Ms. Orvin's breach of contract counterclaim. (R. pp. ___; Transcript of June 25, 2013, hearing.) After argument made both orally and in post-hearing memoranda that the master requested, the master issued an order that denied summary judgment as to everything except Ms. Orvin's SCUTPA claim. (R. pp. ___; order on summary judgment motions; post-summary judgment hearing memoranda.) That order contained no analysis and stated no reasons for the decision reached in it. (R. pp. ___; order on summary judgment motions.)

Ms. Orvin moved to reconsider that order. (R. pp. ___; motion to reconsider & memorandum in support.) The master again asked for post-hearing memoranda and later issued an order in which he stated his reasons for granting the motion for summary judgment as to the SCUTPA claim. (R. pp. ___; post-motion to reconsider hearing memoranda.) That order contained the following:

> As Bank of America stated during the June 25, 2013 hearing on the parties' motions for summary judgment and during the motion for reconsideration hearing, this case is a mere breach of contract case. Defendant's Unfair Trade Practices claim requires something more than a mere breach of contract, and it therefore cannot survive summary judgment.
>
> . . .
>
> [Ms. Orvin] was *approved* for loan modifications July 2009, July 2010, and December 2012 – two of which she chose not to accept. The declarations, therefore, are irrelevant to Defendant's situation. Even if the allegations in the declarations are true, they are inapposite to Defendant's experiences.

Second, the declarations submitted by the defendant relate to testimony regarding Home Affordable Modification Program ("HAMP") loan modifications, as opposed to ordinary investor modifications conducted outside of the federal HAMP program. The July 2009 Modification around which this case centers, on the other hand, was not a HAMP modification. Testimony from MDL declarations regarding the alleged processes of a *different* program is irrelevant to the Defendant's situation.

. . .

. . . the court [in the Massachusetts case in which the declarations were filed] found that allegations of 'unfair trade practices' cannot simply be transferred from one borrower to another – actual evidence that an individual borrower was affected by alleged conduct is necessary.

This principle has been embraced by South Carolina courts in its own unfair trade practices jurisprudence. Specifically, South Carolina courts hold that alleged misconduct by a lender in a loan transaction impacts only the individual borrower, and does not satisfy the 'public interest' requirement.

. . .

The declarations also do not create a genuine issue of material fact because they are inadmissible hearsay.

. . .

There is absolutely no indication that the six declarants would be available to testify at trial. Defendant has not noticed any depositions of the six declarants, nor has she expressed any intent to do so. In fact, Defendant has not even identified the six declarants as potential witnesses at trial, despite an ongoing obligation to supplement her interrogatory responses with that information.

In sum, Defendant's introduction of the six declarations is a transparent attempt to distract the court from the reality that there is *no factual evidence* that Bank of

> America engaged in any unfair or deceptive conduct in this case. Defendant should not be allowed to use irrelevant and inadmissible hearsay declarations from a different proceeding to manufacture a genuine issue of fact so as to survive summary judgment.

(R. pp. _____; Order on motion to reconsider pp. 2, 3, 4, 5.)

This appeal followed.

STATEMENT OF FACTS

Most of the facts material to this appeal are noted above, since most of those facts are entirely uncontested by Bank of America. Ms. Orvin and Bank of America entered into a permanent modification of her mortgage loan that is the subject of this case in July of 2009. (R. pp. ___; affidavits of Ms. Orvin; deposition of Ms. Orvin; deposition of Bank of America.) She made the modification payments. (R. pp. ___; affidavits of Ms. Orvin; deposition of Ms. Orvin; deposition of Bank of America.)

Bank of America, however, decided that it was not going to honor its obligations under that modification. (R. pp. ___; affidavits of Ms. Orvin; deposition of Ms. Orvin; deposition of Bank of America.) Throughout this case, Bank of America has taken the position that the 2009 loan modification at issue does not bind it. From the 30(b)(6) deposition of Bank of America in this case:

> Q: Take a look for me at what's been marked as Defendant's Exhibit 3 to this deposition and let me know when you've had a chance to look at it.
> A: Okay. I'm ready.
> Q: All right. Is this a copy of the written Loan Modification Agreement that's at issue in this case?
> A: Yes.
> Q: All right. To your knowledge, did my client fail to do anything that she was required to do in order to make this a valid Loan Modification

Agreement?

A: No.

Q: Okay. To your knowledge, did my client do anything to make this Loan Modification Agreement invalid at any time?

A: No.

Q: Okay. Is it Bank of America's position that this is a valid Loan Modification Agreement?

A: No.

. . .

Q: Was my client ever notified that Bank of America was withdrawing its offer to enter into this loan modification with her?

MR. PEARSON: Object to the form. You can go ahead.

A: She was notified in 2010 that the modification -- this particular modification was not valid and she would need to reapply for another program.

Q: And she was given no such notification before July 17, 2009 [the date she executed the modification document]?

A: No.

(R. pp. ____; deposition of Bank of America.)

Despite numerous requests by Ms. Orvin, Bank of America never changed its credit reporting, which reflected the subject loan as seriously delinquent, never took any action to dismiss this foreclosure action, refused to apply Ms. Orvin's payments in accordance with the terms of the modified mortgage loan, and sent her notices of intent to accelerate the loan. (R. pp. ____; affidavits of Ms. Orvin; deposition of Ms. Orvin.) Ms. Orvin was denied credit because of the negative credit reporting on the subject loan. (R. pp. ____; affidavits of Ms. Orvin; deposition of Ms. Orvin.)

The following is a quotation from the declaration of Theresa Terrelonge, one of the declarations submitted by Ms. Orvin:

> Bank of America regularly ignored completed loan modifications and did not treat the loan as having been modified in its computer system. Even after a homeowner signed and returned modification documents (both trial modifications and permanent modifications), Bank of America's system continued to show the loan as delinquent. Bank of America continued to send delinquency notices, continued to report homeowners as delinquent to credit reporting agencies, and pursued foreclosure.

(R. pp. ____; Declaration of Theresa Terrelonge.)

All of those things happened here. (R. pp. ____; affidavits of Ms. Orvin; deposition of Ms. Orvin; Ms. Orvin's memorandum regarding motions set to be heard on June 25, 2013.) Bank of America never provided the court with any factual material that would suggest that there was anything incorrect in how the declarations described Bank of America's systematic practices and procedures that deliberately ignored, perverted, and misrepresented the modification process, including treating permanently modified loan as never having been modified. (R. pp. ____; declarations.) Bank of America never provided the court with any factual material indicating that the modification at issue was not a modification of the type involved in that scheme, though it *argued* that it was not.

After Bank of America stated to the court that Ms. Orvin had not named the people who gave the declarations as witnesses in discovery, Ms. Orvin provided the court with proof that she had done that well before the motions hearing. (R. pp. ____; Ms. Orvin's post-hearing memorandum in support of motion to reconsider with attached supplemental interrogatory responses.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard 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. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even 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). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on

disputed factual issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381, S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

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).

ARGUMENT

I. The master-in-equity erred in granting summary judgment where Bank of America's motion stated no grounds and was not served with any factual material in support of the motion.

Any written motion "shall state with particularity the grounds therefor." Rule 7(b)(1), SCRCP. In light of the drastic nature of what a summary judgment motion seeks, e.g., Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008), this requirement is especially important to a motion for summary judgment. A summary judgment motion also has more requirements than other sorts

of motions, and those requirements exist to ensure that the non-moving party has notice of the arguments and evidence he faces when a motion for summary judgment is made. See Chastain v. Hiltabidle, 381 S.C. 508, 517-18, 673 S.E.2d 826, 831 (Ct. App. 2009). Rule 56(c) provides that a summary judgment motion – which presumably complies with the Rule 7(b)(1) requirement that it state its grounds – be served at least 10 days before it is heard.

As with any motion, factual material supporting the motion is ordinarily required to be served *with* a motion for summary judgment, not later. See Rule 6(d), SCRCP. Otherwise, the two-day opposing affidavit rule of Rule 56(c) and the option under Rule 56(f) to serve affidavits about why the non-movant cannot present affidavits to oppose the substance of the motion would be dead letters, totally meaningless; the movant could simply wait until two days before the hearing (or less) and then serve factual to support the motion. 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 do more than rest on his allegations and must meet the motion with factual material showing there is a genuine issue for trial. Rule 56(e), SCRCP (emphasis added).

The text of the written motion in the case at bar states the following as the closest it comes to setting out any grounds:

> That BANA [how Bank of America usually refers to itself in its filings] be granted Summary Judgment in its favor, pursuant to SCRCP Rule 56, on the basis that there is no genuine issue as to any material fact and that BANA is entitled to judgment as a matter of law.
>
> In support of this Motion for Summary Judgment, BANA relies upon all pleadings, discovery responses,

> depositions, affidavits, memoranda which may be filed prior to the hearing, South Carolina Rules of Civil Procedure, statutes, applicable law, and such evidence as may be accepted by the Court.

(R. pp. ____; Bank of America's motion for summary judgment.)

No factual material was served with the motion. (R. pp. ____; Bank of America's motion for summary judgment.) No memorandum was served with the motion. (R. pp. ____; Bank of America's motion for summary judgment.) A person reading this motion cannot tell what the reason is that Bank of America believes it is entitled to prevail on this motion. (R. pp. ____; Bank of America's motion for summary judgment.)

This does not meet the requirements of the rules concerning written motions, whether for summary judgment or anything else. It was not until 3:37 p.m. on the Friday before the Tuesday hearing of its motion – the day that the two-day time limit of Rule 56(c) ran – that Bank of America undertook to notify Ms. Orvin of what the grounds for its motion were. (R. pp. ____; Bank of America's memorandum in support of its motion for summary judgment.) That was also the first time that Bank of America served any factual material in support of its motion. (R. pp. ____; Bank of America's memorandum in support of its motion for summary judgment.) While it is true that "[t]he South Carolina Rules of Civil Procedure do not set a deadline for submitting memoranda of law prepared in conjunction with summary judgment motions[,]" Jones v. Doe, 372 S.C. 53, 60, 640 S.E.2d 514, 518 (Ct. App. 2006), they do set a deadline for notifying the opposing party of the grounds of one's motion and a deadline for serving factual material in support of it. Rules 6(d) and 7(b)(1),

SCRCP. Those requirements are that the grounds be stated in the written motion and that the supporting factual materials be served with it. Id.

Bank of America met neither one of these requirements here. In Chastain, our Court of Appeals held that a party was not prejudiced by a summary judgment movant's failure to state the motion's grounds in the written motion; however, in Chastain (and unlike here), the movant served a memorandum in support of its motion at the time it served the motion. 381 S.C. at 513, 517-18. The Chastain plaintiffs were certainly on notice since the time the summary judgment motion was made of what its grounds were. Id. That is not the case here, and Bank of America's memorandum is not a substitute for compliance with Rules 6(d) and 7(b)(1), SCRCP.

Even standing alone, this provides a reason to deny Bank of America's motion. "By requiring notice to the court and the opposing party of the basis for the motion, Rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly." Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (internal quotation marks omitted). Accordingly, "when a motion is challenged for a lack of particularity, the court should ask whether any party is prejudiced by a lack of particularity or whether the court can comprehend the basis for the motion and deal with it fairly." Id. (internal quotation marks omitted).

Here, Ms. Orvin was prejudiced by the total lack of particularity in Bank of America's motion. Bank of America argued, and the master ultimately found, that the declarations of former Bank of America employees were insufficient to show the existence of a genuine issue of material fact about potential for repetition of what

Bank of America did to Ms. Orvin. (R. pp. ____; transcript of June 25 hearing; Bank of America's memoranda.) Ms. Orvin probably could have obtained affidavits from other witnesses who had been similarly treated by Bank of America, but nothing in the motion for summary judgment suggested that there was any issue about the sufficiency of the declarations. (R. pp. ____; Bank of America's motion for summary judgment; supplemental interrogatory responses.) Nothing in the motion suggested that Ms. Orvin should mount a defense against an argument that the evidence of a systemic scheme of modification corruption did not matter here because the instant modification was not a HAMP modification, nor was anything ever served by Bank of America indicating that the modification in fact was not a HAMP modification. (R. pp. ____; Bank of America's motion for summary judgment.)

"[D]ue process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property." LaSalle Bank Nat'l. Ass'n. v. Davidson, 386 S.C. 276, 279, 688 S.E.2d 121, 122-23 (2009) (quoting State v. Brown, 178 S.C. 294, 300, 182 S.E. 838, 841 (1935)). One of the touchstones of procedural due process is *adequate notice*. Moore v. Moore, 376 S.C. 467, 473, 657 S.E.2d 743 (2008). That is the reason for the requirements of Rule 7(b)(1). Camp, 386 S.C. at 575.

"The law recognizes two kinds of errors [with regard to procedural due process]: trial errors and structural defects. The former are subject to 'harmless error' analysis while the latter are not. . . . [S]tructural defects in the constitution of the trial mechanism defy analysis by harmless error standards." LaSalle Bank, 386 S.C.

at 280 (internal quotation marks omitted). Structural defects are errors in the very way that the process of deciding the issue is set up. Id. When a proceeding is structurally defective, the court administering it weighs out justice using tilted scales, and nothing but relief from the judgment produced by such a process can cure the defect. See id.

Allowing Bank of America to argue a summary judgment motion on grounds never presented in its written motion and only arguably even put before the court on the afternoon of the last day to serve material in opposition to Bank of America's summary judgment motion was what is termed a trial error under the analysis noted in the quotation above from the LaSalle Bank case. While, as discussed below, the master's underlying analysis was erroneous, this error in the way the process of deciding the motion was set up deprived Ms. Orvin of a fair hearing on the motion and is itself reversible error. Camp, 386 S.C. at 575; LaSalle Bank, 386 S.C. at 280.

II. The master-in-equity erred in granting summary judgment based on findings that Ms. Orvin did not name certain witnesses in discovery (when she did), did not take those friendly witnesses' depositions, and that "[t]here is absolutely no indication that the six declarants would be available to testify at trial."

First of all, the court should note that the master's finding that Ms. Orvin did not name as witnesses the people who gave the declarations in the Massachusetts action is false. (R. pp. ____; supplemental interrogatory responses.) As Ms. Orvin's supplemental interrogatory responses (which were presented to the court to rebut this argument by Bank of America) show, the declarants *had* been named as witnesses before the hearing on the summary judgment motions. (R. pp. ____; supplemental interrogatory responses.) In addition, the fact that Ms. Orvin did not notice the

declarants' depositions is immaterial; she was under no obligation to do so. (R. pp. ____; post-hearing memorandum in support of motion to reconsider.)

Discovery rights afford a litigant the opportunity to prepare for trial. Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 308, 609 S.E.2d 838, 842 (Ct. App. 2005). The purpose of discovery is to mandate full and fair disclosure to prevent trial from becoming a guessing game or one of ambush. Cel Products, LLC v. Rozelle, 357 S.C. 125, 132, 591 S.E.2d 643, 646 (Ct. App. 2004). Nothing in the Rules of Civil Procedure obligates a party to have taken the deposition of someone in order to use their testimony in opposition to a summary judgment motion.

The master made a finding – that the declarants had never been named as witnesses in discovery by Ms. Orvin – for which there is no support in the record and which the record plainly shows to be incorrect. (R. pp. ____; order on motion to reconsider; supplemental interrogatory responses.) He then excluded the declarations from his consideration of the summary judgment motion on the basis of a you-must-take-your-own-witnesses'-depositions-in-order-to-use-their-testimony-to-oppose-summary-judgment rule that does not exist. See Rule 30(a)(1), SCRCP ("any party *may* take the testimony of any person, including a party, by deposition upon oral examination")(emphasis added). That is reversible error.

III. The master-in-equity erred in granting summary judgment based on a conception that sworn declarations offered in opposition to the motion "are inadmissible hearsay."

The master found that the declarations by former Bank of America employees "do not create a genuine issue of material fact because they are inadmissible hearsay" and mischaracterized Ms. Orvin's argument about this, stating that she "argues that

the hearsay rule does not apply during the summary judgment stage." (R. pp. ____; order on motion to reconsider.) This is reversible error.

Nothing in the Rules of Civil Procedure prevents the use of written, necessarily out-of-court testimony in opposition to a summary judgment motion. Rule 56 specifically contemplates the use of non-deposition, out-of-court written testimony – affidavits – in opposition to a motion for summary judgment. Rule 56(c), SCRCP. Indeed, the mechanisms in Rule 56 for supporting and opposing summary judgment would seem to prohibit the use of live testimony by a witness at a summary judgment hearing, by either the movant or the opponent. Rule 56(c) & (e), SCRCP.

The declarations are materially the same thing as affidavits and may be used to support or oppose a summary judgment motion just as depositions given in another case may be. See Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 130, 399 S.E.2d 163, 165 (Ct. App. 1990) (deposition testimony from a different case may be used at summary judgment). The declarations are testimony, since they are expressly given under penalty of perjury (R. pp. ____; declarations; Ms. Orvin's memoranda), and the requirement for testimony to be given in South Carolina is that "every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." Rule 603, SCRE.

The declarations are not "inadmissible hearsay," as the master found. (R. pp. ____; order on motion to reconsider; Ms. Orvin's memoranda). The master cited Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002), as support for his ruling in this regard. (R. pp. ____; order on motion to reconsider.) What made the statement

in the affidavit in Hall inadmissible was the fact that the affidavit contained a statement that someone other than the affiant (and not an opposing party) had supposedly made to the affiant. Id. at 175-76. *That* is hearsay in an affidavit that is inadmissible for summary judgment purposes. Id.

Facts presented to the court for consideration in support of or opposition to a motion for summary judgment must be admissible evidence, with the caveat that affidavits are used in place of what would be live testimony at a trial. See Dawkins v. Fields, 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (2003); Saro v. Ocean Holiday Partnership, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). Live testimony is not what is used at the summary judgment stage; rather, the witnesses' testimony is presented in writing, usually through deposition transcripts or affidavits. Such an affidavit must meet three requirements to be considered by a court in deciding a summary judgment motion: the affidavit must "be made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRCP.

Here, the master's order seems to say that the declarations – which contain admissions of a party opponent (the statements by the managers, etc., employed by Bank of America), which are non-hearsay under Rule 801(d)(2), SCRE – could not be considered by him simply because the witnesses who gave the declarations were not testifying live before him. (R. pp. ____; order on motion to reconsider.) This interpretation would upend Rule 56, SCRCP, entirely. If the master's conception of the interplay of the hearsay rule and Rule 56 were correct, how, then, would one ever

oppose a summary judgment motion? With what? Certainly not with the affidavits that Rule 56 itself calls for to oppose summary judgment. Rule 56(c), SCRCP. With the very live testimony at the summary judgment hearing that Rule 56 prohibits a litigant from presenting to oppose the motion? Rule 56(c) & (e), SCRCP. The master's interpretation would create something entirely unworkable – for movants and opponents – out of Rule 56.

The master's entire conception of the interplay of the hearsay rule and the law of summary judgment was wrong, and he based his decision on that incorrect conception. This is reversible error.

IV. The master-in-equity erred in granting summary judgment based on a conception that misconduct by a lender toward a borrower cannot ever satisfy the public interest element of an Unfair Trade Practices Act claim and that this "is a mere breach of contract case."

The master ruled that "this case is a mere breach of contract case." (R. pp. ____; order on motion to reconsider.) Not only is this wholly inconsistent with the master's decision to deny Bank of America summary judgment on all of Ms. Orvin's counterclaims with the exception of the SCUTPA claim, an examination of the law in this regard reveals the flaws in this reasoning and demonstrates that this court should reverse the grant of summary judgment on the SCUTPA counterclaim. (R. pp. ____; order on summary judgment motions.)

To recover under the SCUTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). The South Carolina Supreme Court has stated that demonstrating the potential for an

unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). The Court has "specifically declined" to hold that such potential for repetition must be demonstrated by any particular means and has stated that "each case must be evaluated on its own merits." Id.

In a typical case where a contract is breached, there will be no effect on the public interest. The cases discussing a lack of liability under the SCUTPA for a mere breach of contract, even an intentional one, focus on the isolated nature of a breach of contract under typical circumstances, which makes potential for repetition or other impact on the public interest all but impossible. See Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993); Columbia East Assocs. V. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989); S.C. Nat. Bank v. Silks, 295 S.C. 107, 111, 367 S.E.2d 421, 423 (Ct. App. 1988); Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). That does not, however, mean that the presence of a contractual relationship between the parties and a breach of that contract by one of them will rule out liability of the breaching party under the SCUTPA. In a case against a group of landlords where evidence was presented showing other, different lease violations with different tenants than the plaintiffs, the landlords tried to make that very argument, and this court rejected it. Burbach v. Investors Mgmt. Corp. Intl., 326 S.C. 492, 496-97, 484 S.E.2d 119, 121 (Ct. App. 1997). This court held that "the conduct of the landlords is capable of repetition. '[U]nfair or deceptive acts or practices in the conduct of trade or commerce have an impact on the public interest if the acts or practices have the potential for repetition.'"

Id. at 497 (quoting Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 480, 351 S.E.2d 347, 350-51 (Ct. App. 1986)). This court went on to note that "[t]he problems experienced by the Burbachs are not isolated events. At least several other tenants experienced similar problems. . . . Clearly, the landlords' behavior is capable of repetition." Id.

The master cited a circuit court order for the proposition that "South Carolina courts hold that alleged misconduct by a lender in a loan transaction impacts only the individual borrower, and does not satisfy the 'public interest' requirement." (R. pp. ____; order on motion to reconsider.) Circuit court decisions are not precedent for either this court or circuit courts, and they do not constitute authority for this (incorrect) statement of law. The master also cited Robertson v. First Union National Bank, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002), for this proposition, but that case does not stand for what the master's order claims it does. Robertson contains no language to this effect. In Robertson, the Court of Appeals upheld a grant of summary judgment against a bank on a SCUTPA counterclaim because the record contained no evidence of an unfair or deceptive act in the conduct of trade or commerce by the bank. Id. at 351 & n. 1. Robertson simply does not stand for the proposition of law for which the master cited it.

The master's characterization of In re Bank of America HAMP Contract Litigation, 2013 U.S. Dist. LEXIS 126028, at *47 (D. Mass. Sept. 4, 2013), similarly veers far afield of the Massachusetts District Court's opinion in that case. (R. pp. ____; order on motion to reconsider.) The court there simply concluded that class certification should not be had because there were "individual factual issues as to

whether each plaintiff was actually affected by the same alleged practices." Id. That is an issue for class certification in that case, not for whether the declarations constitute material that was properly before the master at the summary judgment stage in this case. The Massachusetts District Court did not decide anything about the merits of an unfair trade practices claim, and certainly not one under the SCUTPA; that court decided that there was insufficient commonality to certify a class.

When the "mere breach of contract"/"intentional breach of contract" cases discuss the principle at issue, they state that the SCUTPA "is not available to redress a private wrong *where the public interest is unaffected*" and that "a deliberate or intentional breach of a valid contract, *without more*, does not constitute a violation of the Unfair Trade Practices Act." Columbia East Assocs., 299 S.C. at 522 (emphasis added). To prove the "more[,]" to prove that the public interest is affected, all one needs to show is potential – just *potential* – for repetition. Crary v. Djebelli, 329 S.C. at 388; Noack Enterprises, 290 S.C. at 480.

Unlike what the master decided, the declarations of Bank of America's former employees are indeed relevant to this case and particularly to the SCUTPA cause of action. (R. pp. ____; order on motion to reconsider; post-hearing memorandum in support of motion to reconsider.) "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Testimony that Bank of America has ignored the existence of permanent modifications in the past, despite facts to the contrary staring it in the face, and treated the loans subject of them as though the modifications did not exist,

certainly makes more probable the determination that its actions in this case have the potential for repetition than would be probable without the declarations.

Here, Bank of America alluded in its post-hearing memorandum to the overwhelming volume of modifications it processes. (R. pp. ____; Bank of America's post-hearing memorandum.) The evidence that was before the master shows that Bank of America indeed has the potential to repeat actions like the ones involved in this case – indeed, it systematically chose to do so in a scheme it was desperate to distinguish from the facts of the instant case.[1] (R. pp. ____; declarations.) While in the light most favorable to Ms. Orvin, there is at least a scintilla of evidence that Bank of America's conscious failure to honor the modification may have been part of that scheme[2], it does not have to have been part of it in order for this claim to survive summary judgment. (R. pp. ____; Ms. Orvin's memoranda in support of motion to reconsider.) If Bank of America is capable of doing this on a mass scale *on purpose*, it has even more potential to disregard its obligations under modifications with borrowers for reasons that range from the purposeful to the inept. (R. pp. ____; declarations; Ms. Orvin's memoranda in support of motion to reconsider.) What happened here has potential for repetition. (R. pp. ____; declarations; Ms. Orvin's memoranda in support of motion to reconsider.)

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[1] For example, Bank of America argued that it is critically important that the modification at issue here was not a HAMP modification like the ones it says were the only subjects of the scheme, and the master so found. Where, one might ask, is there anything in the record to indicate that the modification at issue here was *not* a HAMP modification? There is nothing in the record to this effect.

[2] Ms. Orvin points the court to the quotation from declaration of Theresa Terrelonge that is set out hereinabove. (R. pp. ____; declaration of Theresa Terrelonge.)

Bank of America is merely trying to muddy the water. In a case with an Unfair Trade Practices cause of action, to exclude proof of similar occurrences is usually reversible error. See Burbach, 326 S.C. at 497-98. It was reversible error here for the master to base his decision that the record contained no genuine issue of material fact as to whether Bank of America's actions in this case impacted the public interest on the master's own choice to go out of his way not to consider evidence that Bank of America has the potential to ignore loan modifications on a mass scale. Particularly in light of the summary judgment standard's mandate that a court view the evidence and all reasonable inferences from it in the light most favorable to the *non*-moving party, this was reversible error.

V. The master-in-equity erred in making his decision on the basis of settlement negotiations that are inadmissible under Rule 408, SCRE.

Despite Ms. Orvin's argument that Rule 408, SCRE, prohibited the master from considering Bank of America's later modification offers because they were evidence of settlement negotiations, the master went out of his way to find in his order that Ms. Orvin was "*approved* for loan modifications July 2009" – the breached loan modification subject of this case – "July 2010, and December 2012 – two of which she chose not to accept." (R. pp. ____; order on motion to reconsider.) Essentially, the master ruled that part of the reason Bank of America should get summary judgment on the SCUTPA claim was because Ms. Orvin did not settle her case on Bank of America's terms. This argument violates the Rules of Evidence and cannot translate into a victory at summary judgment. (R. pp. ____; Ms. Orvin's memoranda; transcript of June 25 hearing.)

Rule 408, SCRE, tells us the following:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

That is exactly what the master allowed Bank of America to do here: use evidence of offers of settlement to satisfy him of the invalidity of her SCUTPA claim. (R. pp. ____; order on motion to reconsider.) This is plainly improper. Rule 408, SCRE.

Ms. Orvin has absolutely no obligation at all to settle this case. Ms. Orvin is under no obligation to be satisfied with whatever scraps Bank of America deigns to throw her from its table. Further, Bank of America had never pled a failure to mitigate damages defense; thus, to the extent that Bank of America was arguing that it should prevail on such a theory, it was not permitted to do so. (R. pp. ____; reply.) Failure to mitigate damages is an affirmative defense. Sapp v Wheeler, 402 S.C. 502, 741 S.E.2d 565 (2013) (describing failure to mitigate damages as an affirmative defense); Curtis v. Blake, 392 S.C. 494, 498, 709 S.E.2d 79, 81 (Ct. App. 2011) (describing failure to mitigate damages as an affirmative defense); see Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467, 478 (Ct. App. 2004) (burden of proving failure to mitigate damages is on party opposing claim for damages, and shifting such burden is improper); Darby v. Waterboggan of Myrtle Beach, Inc., 288 S.C. 579, 586, 344 S.E.2d 153, 156 (Ct. App. 1986) (party opposing claim for damages "had the burden of proof on the issue of mitigation of damages"); Tri-Continental Leasing Corp. v.

Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985) ("party who claims damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced"). It is usually improper (as it was here) to grant summary judgment on the basis of affirmative defenses one has not pled. Unisun Ins. v. Hawkins, 342 S.C. 537, 543, 537 S.E.2d 559, 562 (Ct. App. 2000). While "[a]ll pleadings shall be so construed as to do substantial justice to all parties[,]" Rule 8(f), SCRCP, courts "will not, however, write into the pleadings allegations and defenses that are not presented." Unisun Ins., 342 S.C. at 541-42. The master erred in considering evidence offered in support of a defense to the SCUTPA claim that Bank of America had not pled.

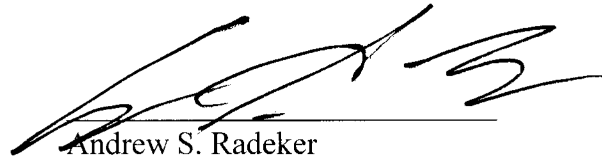
The master's use of this evidence of settlement negotiations to support his decision to grant summary judgment on the SCUTPA claim shows that he stepped outside of what a court may consider in a summary judgment context to find a reason to grant summary judgment to Bank of America on this claim. See Dawkins, 354 S.C. at 67-68; Saro, 314 S.C. at 121. This was reversible error.

CONCLUSION

The law requires that summary judgment on a SCUTPA claim be denied if there is even a scintilla of evidence of the elements of the claim. Hancock, 381, S.C. at 330. Because of the content of the record in this case, it is the duty of this court to reverse the grant of summary judgment on Ms. Orvin's SCUTPA claim. Ms. Orvin asks that the court do so. Ms. Orvin further asks that this court's decision explicitly reverse the master's finding that Ms. Orvin had not named the former Bank of

America employee declarants as witnesses in her discovery responses, as this finding is blatantly false.

Respectfully submitted,



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November 5, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Common Pleas Case No. 2009-CP-32-506
Appellate Case No. 2014-001686

Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP,.................................Respondent,

v.

Elisabeth Orvin and Randy J. Elrod, Defendants,

Of whom Elisabeth Orvin is the..Appellant.

PROOF OF SERVICE

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

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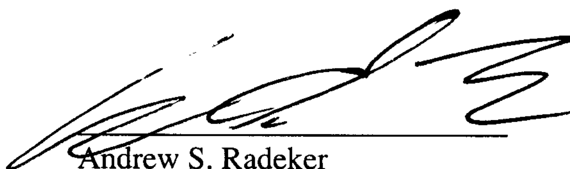
November 5, 2014



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November 5, 2014

VIA U.S. MAIL
The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
P.O. Box 11629
Columbia, SC 29211

Re: Bank of America, etc. v. Elisabeth Orvin, et al.
Appellate Case No. 2014-001686

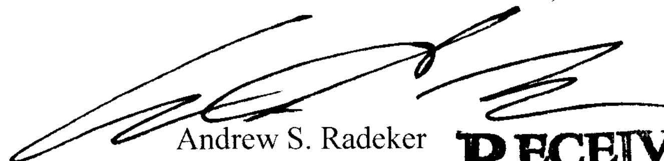
Dear Ms. Kitchings:

Enclosed herewith for filing are an original and one copy of the appellant's initial brief and designation of matter to be included in the record on appeal in the above-referenced case, along with proof of service of the same. Kindly file the same and return a clocked copy thereof to this office in the stamped and addressed envelope enclosed.

Kindly file these documents and return a file-stamped copy thereof to this office in the stamped and addressed envelope enclosed. Thank you for your attention to this matter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.



Andrew S. Radeker

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Enclosures

cc: T. Richmond McPherson III, Esq.

ED

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ppeals

/ Abbott Kitchings
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