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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
COURT OF COMMON PLEAS

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NOV 24 2014

The Honorable Perry M. Buckner
Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2014-000661
Circuit Court Case No. 2013-CP-15-1023

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

Appellants,

vs.

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.

MOTION TO STRIKE REPLY BRIEF

Pursuant to Rules 208 and 240, SCACR, U.S. Bank moves to strike Appellants' Reply Brief, as its entire focus is an argument that was never (1) identified in Appellants' Statement of Issues or (2) discussed in Appellants' opening brief.

ARGUMENT

This appeal asks whether Appellants can twist the doctrine of res judicata in order to void a \$300,000 debt owed to U.S. Bank and get a free beach house on Edisto Island. The circuit court properly concluded that res judicata does not apply in the circumstances

of this case, held that the parties' note and mortgage remain enforceable, and dismissed Appellants' claims to the contrary.

In so ruling, The Honorable Perry M. Buckner explained as follows: "A subsequent and separate alleged default creates a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." (Order Granting Defs.' Mot to Dismiss in Part at 4 (Dec. 18, 2013).) Based on this reality, Judge Buckner held that "U.S. Bank's Note and Mortgage are not worthless" but instead "remain enforceable" because they are subject to potential future defaults by Appellants and future collection actions by U.S. Bank. (*Id.*)

On appeal, Appellants identified only one issue for this Court's review: "When a creditor dismisses with prejudice a claim for the entirety of a debt, may the creditor later file suit on the debt?" (Initial Br. of Appellants at 3.) Nowhere in their Statement of Issues or within the body of their opening brief did Appellants ever suggest that Judge Buckner violated Rule 12(b)'s standard of review or procedural norms when issuing his holding recited above.

In their reply brief, however, Appellants' argument sharply changes course. For the first time, they take issue with Judge Buckner's view of the factual allegations and now argue that the entire basis for the circuit court's ruling was an alleged reliance on "facts outside the Complaint." (Initial Reply Br. of Appellants at 6; *see also id.* at 4, 5, 7, 8, 9, 11, 12, 13.) Nowhere does this argument appear in Appellants' opening brief, but it is pervasive in Appellants' reply; indeed, it seems to be the new thesis upon which their entire appeal is based.

The law does not allow this kind of bait-and-switch appellate posturing. As this Court is aware, there are several steps an appellant must go through in order to preserve issues for this Court's review. Chief among these is set forth directly in Appellate Court Rule 208(b)(1)(B): "Statement of Issues on Appeal. A statement of each of the issues presented for review. . . . Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." This Court regularly enforces this requirement of the Appellate Court Rules. *See, e.g., Burris v. Propst Lumber & Logging, Inc.*, 396 S.C. 85, 94, 719 S.E.2d 695, 700 (Ct. App. 2011) ("[T]his specific issue is not preserved for appellate review because Employer did not specifically raise this point in its Statement of Issues on Appeal. Therefore, the court need not consider it.").

From there, an appellant must give full treatment in its opening brief to each issue for which it seeks review. Otherwise, the issue is not preserved for appellate review, as it is hornbook law that appellants are prohibited from making arguments for the first time in a reply brief. *See, e.g., Divine v. Robbins*, 385 S.C. 23, 44 n.4, 683 S.E.2d 286, 297 n.4 (Ct. App. 2009) ("The reply brief is not the appropriate vehicle to raise new issues on appeal; thus, we decline to address this argument."); *Continental Ins. Co. v. Shives*, 328 S.C. 470, 474 n.2, 492 S.E.2d 808, 811 n.2 (Ct. App. 1997) ("An appellant may not, however, use the reply brief to argue issues not argued in the initial brief."); *Murray v. Murray*, 312 S.C. 154, 159–60, 439 S.E.2d 312, 316 (Ct. App. 1993) ("We are unable to consider this argument. An appellant may not use the reply brief to argue issues not argued in the appellant's brief."); *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief.").

Appellants' newfound, though incorrect, argument that Judge Buckner improperly relied on facts outside of the pleadings when dismissing Appellants' claims violates these requirements of issue preservation. If Appellants believed that Judge Buckner considered improper information or incorrectly viewed the pleadings when entering judgment, they were required to list this perceived error in their Statement of Issues and fully explain their position in the opening brief. They did neither, and because this new argument is pervasive in their reply brief, U.S. Bank respectfully moves for an order striking that filing in its entirety, as it would be impracticable to remove only the offending portions.

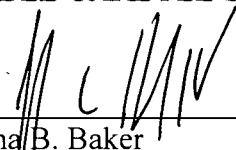
CONCLUSION

Because Appellants' reply brief seeks to advance an argument that is not preserved for appellate review, U.S. Bank respectfully requests that the Court enter an order striking that filing.

Respectfully submitted,

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November 21, 2014
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November 21, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon v. U. S.
Bank National Association, et al.
Appellate Case No. 2014-000661
WCSR File No. 45479.0006.1

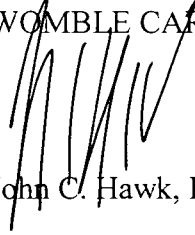
Dear Madame Clerk:

Enclosed please find the original and six copies of the Motion to Strike Reply Brief in the above-reference matter. Also enclosed, please find our firm check in the amount of \$25 for your filing fee.

Thank you in advance for your assistance.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE LLP


John C. Hawk, IV

JCH/cxc
Enclosure

cc w/encl: Todd Kincannon, Esquire

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