THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Court Judge

Case No. 2007-CP-38-00196 and 2007-CP-38-0201
Appellate Case No. 2014-001634

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

v.

Clyde B. Livingston, Technico Marketing & Distribution, Inc., B. Livingston and Charlotte V. Livingston, American First Federal, Inc., Citibank South Dakota, N.A., Branch Bank and Trust Company of South Carolina, G&G Rentals, Miler Communications, Wells Fargo Bank, N.A, ...
Defendants,

Of whom Clyde B. Livingston is the ..... Respondent/Appellant,

And

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

v.

Clyde B. Livingston, American First Federal, Inc., Citibank South Dakota, N.A., Branch Bank and Trust Company of South Carolina, G&G Rentals, Miler Communications, Wells Fargo Bank, N.A.,..... Defendants,

Of whom Clyde B. Livingston is the ..... Respondent/Appellant.

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Statement of Issues on Appeal

I. **Did the trial court err in refusing to recognize First Citizens' right to a bench trial in these foreclosure actions because the counterclaims asserted by Livingston are permissive or defenses to the foreclosure complaint?**

II. **Did the circuit court err in denying First Citizens' motion for summary judgment on Livingston's remaining counterclaims for violation of the attorney preference statute, breach of contract, and libel?**

Statement of the Case

Appellant/Respondent First Citizens Bank and Trust Company, Inc. ("First Citizens") hereby files its initial appellant's brief in connection with its notice of appeal arising out of the circuit court's order denying summary judgment in part, granting summary judgment in part, and denying First Citizens' demand for a bench trial in the foreclosure actions commenced against Respondent/Appellant Clyde B. Livingston ("Livingston").

On November 9, 2000, Livingston obtained a home equity line of credit in the amount of $57,000 from Community Resource Bank, N.A. (Compl., C.A. No. 2007-CP-38-196, at ¶ 9; R. ___.) The equity line was secured by a second mortgage on Mr. Livingston's primary residence at 260 North Brookside, Orangeburg, South Carolina. (*Id.* at ¶ 10; R. __.) On November 29, 2000, Livingston obtained another loan from Community Resource Bank, in the original principal amount of $30,500.00, which was secured by a first mortgage on a different property owned by Mr. Livingston located at 116 Gold Drive, Orangeburg, South Carolina. (Compl., C.A. No. 2007-CP-38-201, at ¶¶ 7-8; R. ___.) Livingston subsequently defaulted on both loans. (Compl., C.A. No. 2007-CP-38-196, at ¶ 17; Compl., C.A. No. 2007-CP-38-201, at ¶ 17; R. ___.)

On February 15, 2007, First Citizens filed a foreclosure action on the second loan ("action 201"), and on February 16, 2007, First Citizens filed a foreclosure action on the home equity line of credit ("action 196").[1] (Compl., C.A. No. 2007-CP-38-196; Compl., C.A. No. 2007-CP-38-201; R. ___.) On March 27, 2007, Livingston answered the

[1] First Citizens is the successor-in-interest to Community Resource Bank, N.A., and was substituted as the Plaintiff on May 17, 2013, in action 196 and on June 10, 2013, in action 201. (Order Amending Caption, C.A. No. 2007-CP-38-196; Order Amending Caption, C.A. No. 2007-CP-38-201; R. ___.)

foreclosure complaints in both actions, alleging improper service and insufficiency of process. (Answer, C.A. No. 2007-CP-38-196; Answer, C.A. No. 2007-CP-38-201; R. ___.)

On May 15, 2007, First Citizens moved for mandatory orders of reference to the master-in-equity in both actions, and both actions were referred on that same date. (Mot. and Order of Reference, C.A. No. 2007-CP-38-196; Mot. and Order of Reference, C.A. No. 2007-CP-38-201; R. ___.) On or about August 9, 2007, Livingston filed motions to quash the orders of reference, arguing that the orders of reference were entered without notice. (Mot. Quash Ex Parte Order of Reference, C.A. No. 2007-CP-38-196; Mot. Quash Ex Parte Order of Reference, C.A. No. 2007-CP-38-201; R. ___.) Livingston also filed motions to amend his answers in both actions on the same date. (Mot. Amend Answer, C.A. No. 2007-CP-38-196; Mot. Amend Answer, C.A. No. 2007-CP-38-201; R. ___.)

On November 7, 2007, the parties entered into consent orders in both actions to resolve Livingston's motions to quash. (Consent Order, C.A. No. 2007-CP-38-196; Consent Order, C.A. No. 2007-CP-38-201; R. ___.) Both consent orders state that:

> 1. The validity of the Order of Reference in this action is confirmed;
> 2. If Defendant Livingston's motion to amend is granted and in his amended answer Defendant Livingston asserts any counterclaim to which he has the right to a trial by jury and requests a jury trial thereon, this action shall be returned to the circuit court; and
> 3. If Defendant Livingston's motion to amend is granted and in his amended answer Defendant Livingston does not assert any counterclaim to which he has the right to a jury trial, or if Defendant Livingston's motion to amend is not granted, this action shall remain within the jurisdiction of the undersigned Master-in-Equity.

(*Id.*; R. ___.) Livingston also moved for summary judgment on First Citizens' foreclosure claim in action 196 on the basis that First Citizens failed to provide him with the contractual notice of right to cure as a condition precedent to foreclosing. (8/01/07 Mot. Summ. J., C.A. No. 2007-CP-38-196; R. ___.)

By Orders dated December 11, 2007, and filed December 14, 2007, the master-in-equity granted Livingston's motions to amend in both actions. (Order Granting Mot. Amend, C.A. No. 2007-CP-38-196; Order Granting Mot. Amend, C.A. No. 2007-CP-38-201; R. ___.) Livingston's amended answer in action 201 asserted counterclaims for breach of contract and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). (Am. Answer and Countercl., C.A. No. 2007-CP-38-201; R. ___.) Livingston's amended answer in action 196 asserted counterclaims for violations of the South Carolina Consumer Protection Code, including the right to cure and attorney preference statutes; breach of contract; violations of the SCUTPA; and libel. (Am. Answer and Countercl., C.A. No. 2007-CP-38-196; R. ___.)

In the Orders granting Livingston's motions to amend, the Master severed the counterclaims from the foreclosure actions, retained jurisdiction over the foreclosure claims, and ordered that, because "Defendant Livingston's Amended Answer and Counterclaim asserts counterclaims on which he has the right to a trial by jury, his counterclaims [were] returned to the circuit court." (Order Granting Mot. Amend, C.A. No. 2007-CP-38-196; Order Granting Mot. Amend, C.A. No. 2007-CP-38-201; R. ___.) The Master ruled that the retention of the foreclosure claim was not inconsistent with the parties' November 7, 2007 Consent Orders, but to the extent the Consent Orders were inconsistent, they were amended. (*Id.*; R. ___.) The Master also denied Livingston's

motion for summary judgment on First Citizens' foreclosure claim in action 196 by order dated December 19, 2007. (12/19/07 Order Den. Summ. J, C.A. No. 2007-CP-38-196; R. ___.)

On December 26, 2007, Livingston filed a motion to reconsider the Master's December 11, 2007 and December 19, 2007 Orders in action 196.[2] (Mot. Reconsider, C.A. No. 2007-CP-38-196; R. ___.) By Orders dated August 4, 2008, and filed August 5, 2008, in both actions, the Master denied Livingston's motion to reconsider and clarified the December 11, 2007 Orders. The Order denying Livingston's motion to reconsider provided:

> i. Defendant's motion to amend is granted,
> ii. Plaintiff's foreclosure action and Defendant's counterclaims are hereby severed,
> iii. Plaintiffs foreclosure remains in the jurisdiction of the Master in Equity for Orangeburg County,
> iv. Defendant's amended answer and counterclaim asserts counterclaims on which he has the right to a trial by jury,
> v. Defendant's counterclaims are returned to the circuit court,
> vi. Defendant's counterclaims shall be heard and concluded prior to the proceeding of Plaintiff's foreclosure action, and
> vii. Plaintiff's foreclosure action is stayed pending the resolution of the Defendant's counterclaims.

(Order Den. Mot. Reconsider, C.A. No. 2007-CP-38-196; Order Den. Mot. Reconsider, C.A. No. 2007-CP-38-201; R. ___.)

On May 1, 2009, First Citizens amended its Complaint in action 196, and on May 14, 2009, Livingston answered, re-alleging the same four counterclaims and adding a fifth counterclaim for violations of the federal Truth-in-Lending Act, 15 U.S.C. § 1635,

[2] The public index does not reflect the filing of a motion to reconsider in action 201.

and Regulation Z, 12 C.F.R. § 226.23. (Am. Compl., C.A. No. 2007-CP-38-196; Answer to Am. Compl., C.A. No. 2007-CP-38-196; R. ___.)

On July 29, 2009, First Citizens moved for summary judgment on Livingston's counterclaims before the circuit court in both actions. (7/29/09 Mot. Summ. J., C.A. No. 2007-CP-38-196; 7/29/09 Mot. Summ. J., C.A. No. 2007-CP-38-201; R. ___.) By Order filed June 14, 2010, summary judgment was granted in part and denied in part in action 196.[3] (6/14/10 Order Granting Summ. J. in Part and Den. Summ. J. in Part, C.A. No. 2007-CP-38-196; R. ___.) Specifically, summary judgment was denied on Livingston's counterclaims for violation of the attorney preference statute, breach of contract, SCUTPA, and libel, but was granted in favor of First Citizens on Livingston's counterclaims for violation of the Truth-in-Lending Act and the failure to provide notice of right to cure, except that the latter could still be raised as a defense to the foreclosure action. (*Id.*; R. ___.)

First Citizens again filed motions for summary judgment on Livingston's counterclaims on October 19, 2012, in action 196 and on January 3, 2013, in action 201. (10/19/12 Mot. Summ. J., C.A. No. 2007-CP-38-196; 1/03/13 Mot. Summ. J., C.A. No. 2007-CP-38-201; R. ___.) First Citizens also filed motions demanding a bench trial and seeking to strike the jury demands on Livingston's counterclaims for attorney preference, libel, breach of contract, and SCUTPA on January 7, 2013, in action 196 and on January 8, 2013, in action 201. (Mot. Strike, C.A. No. 2007-CP-38-196; Mot. Strike, C.A. No. 2007-CP-38-201; R. ___.) The two actions were consolidated for pre-trial purposes, and by Order filed April 17, 2014, summary judgment was granted in part and denied in part.

[3] The public index does not reflect the filing of an order granting summary judgment in part and denying summary judgment in part in action 201.

(Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand; R. ___.) In particular, the circuit court determined that First Citizens was entitled to summary judgment on Livingston's SCUTPA counterclaims, but summary judgment was denied on Livingston's counterclaims for breach of contract, libel, and violation of the attorney preference statute, except that Livingston could not obtain any affirmative relief on the attorney preference claim other than to reduce any debt found to be owed to First Citizens. (*Id.*; R. ___.) First Citizens' motions demanding a bench trial and seeking to strike Livingston's jury demands were also denied. (*Id.*; R. ___.) After the circuit court's order granting summary judgment on the SCUTPA counterclaims, the remaining claims in action 196 are breach of contract, libel, and violation of the attorney preference statute, and in action 201, breach of contract.

Both parties filed motions for reconsideration of the circuit court's April 17, 2014 Order, which were denied via order dated July 2, 2014. (Order Den. Mots. Reconsideration; R. ___.) First Citizens timely filed this appeal. (Notice of Appeal; R. __.) Livingston has cross-appealed. (Notice of Cross-Appeal; R. __.)

Standard of Review

Orders affecting the mode of trial affect a substantial right and must be appealed immediately. *Frampton v. S. Carolina Dep't of Transp.*, 406 S.C. 377, 385-86, 752 S.E.2d 269, 274 (Ct. App. 2013). "Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). This Court may review questions of law *de novo* with no deference to the decisions of the circuit court. *Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014), *reh'g denied* (Dec. 10, 2014).

In reviewing the denial of a motion for summary judgment, an appellate court must view the evidence and all inferences in the light most favorable to the nonmovant. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 461 (2004). This Court should reverse the decision of the circuit court and enter summary judgment in favor of the movant when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Summary of Argument

This appeal and cross-appeal arise out of the circuit court's order depriving First Citizens of its constitutionally-protected mode of trial in this foreclosure action by denying its motion asking for the entire action to be tried before the master-in-equity at a bench trial. Because orders depriving a party of its rightful mode of trial have to be appealed immediately, this Court can also review the circuit court's decision to deny First Citizens' motions for summary judgment on Livingston's remaining counterclaims, as the circuit court's ruling on summary judgment is necessarily intertwined with the mode of trial issues presently before the Court.

The circuit court erred in failing to send all of Livingston's remaining counterclaims to the master-in-equity for a bench trial because none of these counterclaims, as pled in this action, are legal and compulsory. In bringing these claims in response to First Citizens' foreclosure complaints, Livingston waived any right to a jury trial to which he may have been entitled. The circuit court also erred in denying First Citizens' motion for summary judgment with respect to Livingston's claims for alleged violation of South Carolina Code Section 37-10-102, the attorney preference statute; alleged breach of contract; and alleged libel. The Record before this Court shows

that no material dispute of fact exists with respect to these claims and First Citizens is entitled to judgment as a matter of law, thereby permitting the foreclosure actions to proceed before the master-in-equity.

Accordingly, this Court should reverse the circuit court's failure to refer all claims in this foreclosure action to the master-in-equity for a bench trial. In addition, this Court should reverse the circuit court's denial of First Citizens' summary judgment motions with respect to the three remaining counterclaims. Should this Court reverse the circuit court's order on First Citizens' motions for summary judgment, it will be unnecessary to address the mode of trial issues. In either event, any portion of this action that remains following adjudication of this appeal would properly be remanded to the master-in-equity for a bench trial; the only difference in the outcome would be whether Livingston is entitled to seek affirmative relief from First Citizens or only assert defenses to the foreclosure.

This Court should reverse the circuit court's order 1) denying First Citizens' demand for a bench trial on all claims in this action and 2) denying First Citizens' motions for summary judgment on Livingston's counterclaims for alleged violations of the attorney preference statute, breach of contract, and libel.[4]

[4] Livingston has cross-appealed. First Citizens will address the issues of why certain rulings on summary judgment in First Citizens' favor should be affirmed in its initial respondent's brief, depending on the properly preserved issues raised by Livingston.

Argument

I. The trial court erred in refusing to recognize First Citizens' right to a bench trial in these foreclosure actions because the counterclaims asserted by Livingston are permissive or defenses to the foreclosure complaint.

The circuit court erred in denying First Citizens' motions demanding a bench trial and seeking to strike Livingston's jury demands. Each of Livingston's counterclaims are either permissive or merely affirmative defenses to First Citizens' foreclosure actions which sound in equity. Reversal of the circuit court's order is warranted.

A. The law of the case doctrine does not preclude a decision on First Citizens' motions to strike.

The trial court erred by denying First Citizens' motion to strike Livingston's jury demand on the basis that the master-in-equity's August 4, 2008 Order denying Livingston's motion to reconsider the December 11, 2007 Order granting Livingston's motion to amend was the law of the case. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at p. 13; R. ___.)

"Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order." *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014) (citations omitted). First Citizens did not abandon its right to appeal and in fact appealed at the first opportunity it could under the law, so the law of the case doctrine has no application to the instant matter. First, the master-in-equity's December 11, 2007 Order came in the context of granting Livingston's motion to amend. "An order permitting amendment of pleadings is interlocutory and generally is not appealable until final judgment." *Collins v. Sigmon*, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989) (citations omitted). The Order does not make any binding conclusions of law

by stating that the counterclaims asserted a right to a trial by jury; instead, the Order merely reflects that Livingston asserted a demand for a jury trial on his counterclaims. (Order Granting Mot. Amend, C.A. No. 2007-CP-38-196; Order Granting Mot. Amend, C.A. No. 2007-CP-38-201; R. ___.) Thus, First Citizens could not have appealed from the December 11, 2007 Order. Second, First Citizens could not have appealed from the master-in-equity's August 4, 2008 Order denying Livingston's motion to reconsider. Livingston's motion asked the master-in-equity to alter or amend the December 11, 2007 Order to not sever First Citizens' foreclosure claim from Livingston's counterclaims. (Mem. in Supp. of Mot. to Reconsider, C.A. No. 2007-CP-38-196; Mem. in Supp. of Mot. to Reconsider, C.A. No. 2007-CP-38-201; R. ___.) The August 4, 2008 Order denied the motion to reconsider, so First Citizens was not aggrieved by the Order and could not have appealed from it. *See Neal v. Clark*, 196 S.C. 139, 12 S.E.2d 921, 926 (1941) (stating that the general rule is that a party who prevails on an order and suffers no error cannot appeal).

"Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal." *Bone v. U.S. Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012). Because First Citizens could not have appealed the December 11, 2007 or August 4, 2008 Orders, the recognition in the December 11, 2007 Order that Livingston had demanded a jury trial on his counterclaims is not the law of the case on First Citizens' demands for bench trials. Accordingly, the circuit court erred in relying on the law of the case doctrine to deny First Citizens' motions requesting a bench trial and asking the trial court to strike Livingston's jury demands.

B. Livingston's counterclaims are permissive or are properly asserted as defenses to the foreclosures, and he is not entitled to a jury trial on any of his counterclaims or defenses.

Both actions filed by First Citizens seek foreclosure. (Compl., C.A. No. 2007-CP-38-196; Compl., C.A. No. 2007-CP-38-201; R. ___.) "A mortgage foreclosure is an action in equity." *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440-41 (2014) (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "In equity the parties are not entitled, as a matter of right, to a trial by jury." *Id.*, 407 S.C. at 328, 755 S.E.2d at 441. However, a defendant is entitled to a jury trial on a counterclaim to an action in equity if, and only if, the counterclaim is both compulsory and legal. *Id.*, 407 S.C. at 329-30, 755 S.E.2d at 441-42.

A counterclaim is compulsory if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(a), SCRCP. To determine whether a counterclaim "arises out of the same transaction or occurrence" as a claim, the court must apply the "logical relationship" test. *N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). A counterclaim to a foreclosure complaint is only compulsory if it "would affect the lender's right to enforce the note and foreclose the mortgage." *Blackburn*, 407 S.C. at 331, 755 S.E.2d at 442 n.7 (citing *DAV Corp*, 298 S.C. at 518-19, 381 S.E.2d at 905). The timing of when the counterclaims arose also bears on their "logical relationship" to the claim. *See Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 896 (1995) (finding that no logical relationship existed between a claim premised on factual allegations that took place entirely after the events supporting an earlier action between the parties).

The determination of whether a counterclaim is legal or equitable depends on the "main purpose" of the claim. *Baughman v. Am. Tel. & Tel. Co.*, 298 S.C. 127, 129, 378 S.E.2d 599, 600 (1989). "The main purpose of the action should generally be ascertained from the body of the complaint. However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Ins. Fin. Servs., Inc. v. S. Carolina Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978). "[T]he nature of the issues" determines the character of an action as legal or equitable. *Bell v. Mackey*, 191 S.C. 105, 3 S.E.2d 816, 822 (1939) (citations omitted).

Following the circuit court's order granting summary judgment in part and denying summary judgment in part, Livingston's remaining counterclaims are libel, violation of the attorney preference statute, and breach of contract. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand; R. ___.) The libel counterclaim is permissive, and by filing the counterclaims in response to First Citizens' equitable action, Livingston waived any right to a jury trial which he may have had.[5] *Blackburn*, 407 S.C. at 329-30, 755 S.E.2d at 441-42. Livingston's attorney preference and breach of contract claims, as cast in this action, are merely equitable defenses to which he is not entitled to a jury trial. *Id.*, 407 S.C. at 328, 755 S.E.2d at 441. Accordingly, Livingston is not entitled to a jury trial on any of his counterclaims, and the circuit court erred in denying First Citizens' motion to strike the jury demand.

[5] The same is true for Livingston's claims for violation of the SCUTPA, but the circuit court properly granted summary judgment in favor of First Citizens on these claims.

1. Livingston's libel counterclaim is permissive.

In action 196, Livingston alleges that First Citizens published allegedly false statements to credit reporting agencies by stating he was in default and that First Citizens was entitled to foreclose. (Answer to Am. Compl., C.A. No. 2007-CP-38-196, at ¶¶ 56-63; R. ___.) Livingston does not seek rescission of the note, a declaration that the mortgage is unenforceable, or any other relief which would affect First Citizens' right to enforce the note or foreclose the mortgage. Livingston only seeks damages, and if Livingston were to prevail on his claim for libel, the underlying and foreclosure action would not be affected whatsoever. Moreover, the publication of allegedly false credit statements is temporally independent and unrelated to the validity of the note and mortgage and First Citizens' right to foreclose. *See Mullinax*, 317 S.C. at 396, 453 S.E.2d at 896 (finding no "logical relationship" when there was no adequate temporal relationship). There is no "logical relationship" between whether First Citizens published false statements to credit reporting agencies and whether the mortgage is valid and enforceable, so Livingston's libel claim is permissive. *See DAV Corp.*, 298 S.C. at 518-19, 381 S.E.2d at 905 (finding that a counterclaim which did not affect the enforceability of the note was permissive). Accordingly, Livingston waived his right to a jury trial on his libel claim by bringing it in response to the foreclosure complaint, and the circuit court erred by denying First Citizens' motion to strike the jury demand for Livingston's libel claim. *See Blackburn*, 407 S.C. at 329-30, 755 S.E.2d at 441-42.

2. Livingston's attorney preference counterclaim is a recoupment defense to the foreclosure action, not a counterclaim.

The circuit court found that Livingston was barred from affirmatively recovering on his counterclaim in action 196 for violation of the attorney preference statute, except

as to reduce the debt to First Citizens. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at 9; R. ___.) Thus, Livingston may only assert any alleged violations of the attorney preference statute as an affirmative defense of equitable recoupment, not as a counterclaim. *See Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389 (Ct. App. 2004) (finding that recoupment was an equitable defense for determination by the court). After limiting Livingston's claim alleging violations of the attorney preference statute to the defense of recoupment, the circuit court erred in not striking his demand for a jury trial because the violations no longer constituted a counterclaim.

3. The main purpose of the allegations supporting Livingston's breach of contract "counterclaims" sounds in equity as defenses, and to the extent the Court deems them to constitute legal counterclaims, such counterclaims are permissive.

Livingston alleges that First Citizens breached the two notes in three unrelated ways. These allegations each fail to entitle Livingston to jury trials because they are either properly asserted only as defenses to the foreclosure action, like his attorney preference claim is, or because they are permissive and he has waived any right to a jury trial. Moreover, in general, the "main purpose" of Livingston's breach of contract counterclaims is to manufacture a jury trial on what are essentially allegations that he believes that First Citizens has treated him unfairly and should not be entitled to foreclose. This Court should look past the labels on Livingston's breach of contract counterclaims to recognize that they are not legal and compulsory counterclaims entitling Livingston to a jury trial and that he instead seeks relief under the circuit court's equitable powers as defenses to the foreclosure actions.

Livingston first alleges that First Citizens breached the terms of the home equity line of credit in action 196 by failing to provide Livingston with a notice of right to cure before foreclosing, as the note requires:

> **RIGHT TO CURE:** If this is a consumer credit transaction, we ***may exercise our remedies only if*** you fail to exercise your right to cure a default. After you are in default on this agreement for 10 or more days because of a failure to make a payment and if you have not voluntarily surrendered possession of the collateral, we must provide you with a written notice of default and your right to cure. You have 20 days after we mail this notice (or 20 days after actual delivery if we use a means other than first class mail) in which to cure the default.

(Note, Am. Compl. Ex. B, C.A. No. 2007-CP-38-196; R. ___ (emphasis added).) Thus, Livingston's allegation that First Citizens failed to satisfy the condition precedent before foreclosing is a defense to the foreclosure action, not a counterclaim entitling Livingston to monetary damages or to undo the loan transaction. *See Floyd v. St. Paul Fire & Marine Ins. Co.*, 285 S.C. 148, 150, 328 S.E.2d 132, 132 (Ct. App. 1985) (recognizing that failure to satisfy a condition precedent is an affirmative defense to a breach of contract action). Indeed, the failure to provide a notice of right to cure was the basis of Livingston's August 1, 2007 motion for summary judgment on First Citizens' foreclosure claim, which the master-in-equity denied. (8/01/07 Mot. Summ. J., C.A. No. 2007-CP-38-196; R. ___.) Regardless, First Citizens provided the requisite notice of right to cure. (Notice of Right to Cure, Am. Compl. Ex. D, C.A. No. 2007-CP-38-196; R. ___.) Accordingly, to the extent this allegation is allowed to survive despite the Record unquestionably reflecting that the notice of right to cure was properly provided, it may only be asserted as a defense to the foreclosure, not as a counterclaim entitling Livingston to a jury trial.

Livingston next alleges that First Citizens breached the note in action 196 by failing to allow him to use the full line of credit. (Answer to Am. Compl., C.A. No. 2007-CP-38-196, at ¶ 48; R. ___.) However, the note allows First Citizens to reduce Livingston's credit limit under the home equity line:

> **DEFAULT AND REMEDIES:** . . .
>
> In addition, we may temporarily prohibit you from obtaining additional extensions of credit, or reduce your credit limit if:
>
> (1) The value of the dwelling securing this home equity line of credit declines significantly below its appraised value for purposes of this line;
>
> (2) We reasonably believe you will not be able to meet the repayment requirements due to a material change in your financial circumstances;
>
> (3) You are in default of a material obligation of this agreement, which shall include, but is not limited to, your ongoing obligation to supply us with information we feel we need to assess your financial condition; . . .
>
> In the event that we suspend your right to additional advances or reduce your credit line, we will send you notice of our decision at the address listed on the front of this agreement. (You should inform us of any change in your address.) If we have based our decision to suspend or reduce your credit privileges on an assessment of your financial condition or performance under this plan, and you believe that your situation has changed, you must request that we re-evaluate your situation, and reinstate your credit privileges.

(Note, Am. Compl. Ex. B, C.A. No. 2007-CP-38-196; R. ___.) Accordingly, as pled, the allegation that First Citizens lowered Livingston's credit limit cannot be a breach alone. Regardless, Livingston's counterclaim premised on this allegation is permissive because it has no logical relationship to the enforceability of the note and mortgage. Not giving Livingston access to a larger loan did not cause him to default or prevent him from repaying the debt upon which he defaulted. *See N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) (determining that

counterclaims related to a breach which could not have avoided a default on the note at issue were permissive). Moreover, the "transaction or occurrence" of this allegation was the lowering of his credit limit, which occurred separately from and long after the "transaction or occurrence" to execute the note and mortgage.[6] *See Carolina First Bank v. BADD, L.L.C.*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 21) (holding that breach of contract claim alleging a conspiracy which took place after the execution of the guaranty agreements at issue was permissive because it did not affect the enforceability of the guaranties); *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 896 (1995) (finding no "logical relationship" when there was no adequate temporal relationship). Livingston's obligation to repay his debts was not excused because he was not offered more money upon which to default, and First Citizens' right to foreclose on the collateral securing that line of credit is unaffected as pled. *See Ro-Lo Enterprises v. Hicks Enterprises, Inc.*, 294 S.C. 111, 113, 362 S.E.2d 888, 889 (Ct. App. 1987) ("To constitute abandonment of contract by conduct, the actions relied upon must be positive, unequivocal, and inconsistent with the existence of a contract."). Thus, to the extent that this allegation supports a counterclaim, Livingston waived any right to a jury trial because it is permissive and his claim would not undo the underlying transaction as pled.

Livingston's third allegation of a breach of contract, in action 201, is that First Citizens breached the covenant of good faith and fair dealing by making inconsistent representations about the amount Livingston owed on the debt. (Am. Answer and

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[6] Livingston's counterclaims were filed in 2007, so for this allegation to not be facially barred by the three-year statute of limitations, it must have occurred *four years* after execution of the note and mortgage. S.C. Code Ann. § 15-3-530(1).

Countercl., C.A. No. 2007-CP-38-201, at ¶¶ 19, 31-32; R. ___.) The covenant of good faith and fair dealing arises in equity, and Livingston would not be entitled to a jury trial on an equitable doctrine. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 330, 574 S.E.2d 502, 507 (Ct. App. 2002). Further, the note in action 201 requires that Livingston pay $336.57 on the first day of each month, and no term of the note requires that First Citizens provide notice of any amounts owed by Livingston. (Note, Compl. Ex. B, C.A. No. 2007-CP-38-201; R. ___.) Thus, First Citizens was not contractually required to inform Livingston how much he owed, and the failure to provide an accounting of amounts owed after Livingston defaulted is not a breach of the note and does not affect the validity of the underlying transaction or right to foreclose. Accordingly, Livingston's third allegation also fails on its merits, but as pled, it is both equitable and permissive.

By the plain terms of the notes, all three of Livingston's allegations simply are not breaches of the notes.[7] Regardless, they are pled as, respectively: (1) a defense to the foreclosure; (2) permissive; and (3) permissive and arising in equity. Although these allegations each fail for different reasons, that reflects the scattershot nature of the pleadings rather than any breaches by First Citizens.

Further, Livingston should not be entitled to a jury trial because his main purpose in asserting these allegations is to prevent the foreclosures from occurring, not to obtain monetary damages. Livingston seeks a jury to hear his allegations of purportedly unfair acts by First Citizens and provide factual findings of inequity, which could then support a finding in the subsequent foreclosure actions that the foreclosure claims are barred by the equitable defense of unclean hands. In fact, Livingston freely argues that his desired

[7] Accordingly, First Citizens is entitled to summary judgment on Livingston's "claims" for breaches of contract, as discussed in Section II(C), *infra*.

effect of asserting these allegations is to excuse his defaults on the notes. (12/11/13 Tr., p. 25:21-26:3; p. 39:4-40:11; R. ___.) Moreover, Livingston's allegations that First Citizens had unclean hands are the same as those supporting the breach of contract claims. In action 196, Livingston asserts that First Citizens had unclean hands due to the failure "to comply with the terms of its own Home Equity Line document" and its "inconsistent representations to Defendant Livingston concerning the amount it claims it is owed on the debt subject of this action," and in action 201, Livingston alleges that First Citizens made "inconsistent representations to Defendant Livingston concerning the amount it claims it is owed on the debt subject of this action." (Answer to Am. Compl., C.A. No. 2007-CP-38-196, at ¶ 30; Am. Answer and Countercl., C.A. No. 2007-CP-38-201, at ¶ 19; R. ___.)

The above analysis is proven true by an examination of Livingston's alleged damages. Livingston's only allegations of damages are, in action 196, his inability to use the full line of credit, and in both actions, his litigation expenses incurred in defending the foreclosures. (Answer to Am. Compl., C.A. No. 2007-CP-38-196, at ¶ 49; Am. Answer and Countercl., C.A. No. 2007-CP-38-201, at ¶ 33; R. ___.) Not being able to use the full amount of the credit line is an injury which may only be remedied by ordering First Citizens to specifically perform pursuant to the contract—relief in equity. *See Collier v. Green*, 244 S.C. 367, 371, 137 S.E.2d 277, 280 (1964) (finding that a defense or counterclaim raising an issue concerning the consideration of a contract is equitable); *Fesmire v. Digh*, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009) (stating that specific performance is an equitable remedy). Livingston's allegations that he is entitled to recover his litigation expenses hardly convert his equitable defenses into

legal counterclaims. Livingston has not identified a term of the note nor a statute entitling him to recover his fees and costs in defending the foreclosure actions, and "[a] party cannot recover attorney's fees unless authorized by contract or statute." *Spriggs Grp., P.C. v. Slivka*, 402 S.C. 42, 52, 738 S.E.2d 495, 501 (Ct. App. 2013). Even if Livingston is entitled to attorneys' fees for having to defend an improper foreclosure action, as he claims, such costs cannot be awarded by the circuit court anyway. Logically, a court cannot award expenses incurred in defending a foreclosure action *which has yet to occur*. If Livingston is entitled to his litigation expenses, the master-in-equity may properly award them. *See Ins. Fin. Servs., Inc. v. S. Carolina Ins. Co.*, 271 S.C. 289, 294, 247 S.E.2d 315, 318 (1978) ("The trial of a case in a court of equity does not foreclose the award of damages." (citation omitted)). Other than an award of attorneys' fees, however, Livingston seeks no monetary damages whatsoever for his breach of contract claims, reinforcing that the purpose of the claims sounds in equity.

Put simply, Livingston's allegations of purported breaches of the notes at issue are not legal and compulsory counterclaims—they are allegations of unfairness which do not seek damages and instead attempt to block the foreclosures. Livingston's main purpose, as reflected in the allegations and his lack of damages, is to attempt to acquire a jury trial, cause further delay, and hope to establish alleged bad acts to use against First Citizens before its foreclosure actions would be tried by the master-in-equity. This Court should reject his attempt to manufacture jury trials on his defenses. *See Rosenbaum v. S-M-S 32*, 311 S.C. 140, 142, 427 S.E.2d 897, 897 (1993) (stating that a defendant "cannot earn the right to a jury trial" by bringing an inappropriate legal counterclaim rather than the appropriate equitable claim). Even if Livingston's allegations were true as pled, First

Citizens still would not have breached the terms of either note, the notes would still be enforceable, and Livingston still would not have suffered actual damages compensable at law—which he does not even seek. The "main purpose" of Livingston's purported counterclaims for breach of contract is to establish affirmative defenses to the foreclosure action, which does not entitle him to a jury trial. Striking Livingston's jury demands on his breach of contract counterclaims and referring the entire action to the master is appropriate.

II. The circuit court erred in denying First Citizens' motion for summary judgment on Livingston's remaining counterclaims for violation of the attorney preference statute, breach of contract, and libel.

The circuit court erred in denying First Citizens' motions for summary judgment. The Record reflects that each of Livingston's counterclaims fail as a matter of law for the grounds argued below with respect to each particular claim. Reversal of the circuit court's order and summary judgment in favor of First Citizens is warranted.

A. The denial of First Citizens' right to a bench trial is intertwined with the denial of First Citizens' motions for summary judgment, and review of both will result in proper alignment of these actions and avoid unnecessary litigation.

Generally, the denial of a motion for summary judgment is not immediately appealable. *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994). However, this Court will consider orders that are not directly appealable "if there is an appealable issue before the court and a ruling on appeal will avoid unnecessary litigation." *Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014); *see also Morris v. Anderson Cnty*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (stating that an appellate court "may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary

litigation"). On the other hand, declining to consider interlocutory orders accompanied by an appealable order is appropriate if the issues are "novel and relating to the sufficiency of the allegations, which the trial court had not yet had the opportunity on which to rule." *Watson*, 407 S.C. at 459, 756 S.E.2d at 164 (citing *Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998)).

In this action, the two sections of the circuit court's order are necessarily intertwined because the determination of whether Livingston has properly alleged counterclaims entitling him to a jury trial requires resolution of the same factual and legal arguments as the determination of whether First Citizens is entitled to summary judgment on Livingston's counterclaims. As explained in Section I(B), *supra*, Livingston's purported counterclaim for violations of the attorney preference statute has been limited to the defense of recoupment to be asserted in the foreclosure action. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at 9; R. ___.) Because it is no longer a counterclaim, striking the jury demand is technically correct, but granting summary judgment on the affirmative counterclaim is the more appropriate remedy to properly align the assertion of the alleged violations as a recoupment defense. Similarly, Livingston's purported counterclaims for breach of contract are accurately characterized as equitable defenses because their purpose—and the only available relief—is to prevent First Citizens from foreclosing. Thus, summary judgment on the counterclaims is appropriate to avoid the master-in-equity receiving Livingston's contract and attorney preference defenses improperly aligned as affirmative claims for monetary damages (which, again, Livingston did not request).

Moreover, the orders are intertwined because the effect of granting either relief will be the same procedurally. If this Court either strikes the jury demand or grants summary judgment on Livingston's counterclaims, these actions will be referred to the master-in-equity, and Livingston will presumably re-assert the same purported violations at issue as defenses to foreclosure. The difference, however, is that if summary judgment is granted, the alleged violations will be asserted as defenses to foreclosure rather than as affirmative claims for relief and the pleadings will be properly aligned. This Court has previously reviewed the denial of an interlocutory motion going to the merits with an appealable mode of trial order because the issues were intertwined, and the Court should do the same in this instance. *See Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001) (reviewing denial of motion to dismiss in conjunction with denial of motion to compel arbitration). Moreover, these foreclosure actions have been pending for seven years. The Court can permit the foreclosure actions to proceed and end the tireless re-pleading and procedural machinations by the debtor, who defaulted on his loans over seven years ago, by granting summary judgment rather than merely striking the jury demand.

Because the attorney preference and breach of contract allegations should be sent to the master-in-equity as defenses and because Livingston's permissive counterclaim for libel fails as a matter of law, judicial economy favors the grant of summary judgment on Livingston's libel counterclaim rather than allowing the insufficient claim to survive as a counterclaim before the master-in-equity. *See Watson*, 407 S.C. at 459, 756 S.E.2d at 163 (holding that review of an interlocutory order is appropriate to avoid unnecessarily litigation).

B. Livingston's attorney preference counterclaim is barred by the statute of limitations except as a recoupment defense.

The circuit court erred by failing to grant summary judgment in favor of First Citizens on Livingston's attorney preference counterclaim in action 196. The attorney preference statute requires that a creditor ascertain the borrower's preferred legal counsel for a loan closing before the date of the closing. S.C. Code Ann. § 37-10-102. The circuit court properly found that Livingston is barred from seeking affirmative relief on his attorney preference counterclaim pursuant to South Carolina Code section 37-10-105(C) because the counterclaim was brought over three years after the closing of his loan, which occurred on or around November 9, 2000. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at 9; R. ___.) The circuit court also found that Livingston was limited to asserting the alleged violation via the defense of recoupment to First Citizens' foreclosure claim pursuant to South Carolina Code section 37-10-105(A). (*Id.*; R. ___.) The circuit court erred, however, in denying summary judgment on the "counterclaim." (*Id.*; R. ___.) Rather than merely striking the jury demand, which would allow the attorney preference recoupment defense to continue as a counterclaim, this Court should enter summary judgment in favor of First Citizens to climinate it from the action as a counterclaim.

C. Livingston's purported breach of contract counterclaims fail because they are merely defenses to the foreclosure action, as pled, and fail on their merits.

Summary judgment is appropriate on Livingston's counterclaims for breach of contract. As argued in Section I(B)(3), *supra*, Livingston's allegations of breaches sound in equity as defenses to First Citizens' foreclosure action, and summary judgment on the

counterclaims is appropriate such that Livingston may assert the alleged violations as defenses to the foreclosure as is proper.

Further, to the extent the Court construes the defenses as counterclaims, Livingston's alleged breaches of contract fail on their merits. The first allegation of a breach in action 196, failure to provide the notice of right to cure, fails on its face because First Citizens provided the requisite notice of right to cure. (Notice of Right to Cure, Am. Compl. Ex. D, C.A. No. 2007-CP-38-196; R. ___.) This is indisputable, as shown by the Record.

Moreover, under the plain terms of the note, the effect of the failure to provide a notice of right to cure is merely that First Citizens may not yet foreclose at that time. (Note, Am. Compl. Ex. B, C.A. No. 2007-CP-38-196; R. ___.) Livingston would not have a claim for breach of contract and First Citizens could correct any mistake by re-issuing a notice (had it not issued one). (*Id.*; R. ___.) Furthermore, in order for First Citizens to be required to provide a notice of right to cure under the terms of the note, Livingston must be in default; if Livingston had already defaulted, he would not be entitled to recover damages for breach of contract. *See Mozingo & Wallace Architects, L.L.P. v. Grand*, 379 S.C. 478, 484, 666 S.E.2d 267, 270 (Ct. App. 2008) ("A party who seeks to recover damages for breach of a contract must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready and willing to perform it.").

Livingston's second allegation of a breach in action 196, failure to allow use of the full credit line, is barred by the statute of limitations applicable to breach of contract claims. S.C. Code Ann. § 15-3-530(1). The note indicates that the maximum line of

credit potentially available to Livingston was $57,000. (Note, Compl. Ex. B, C.A. No. 2007-CP-38-201; R. ___.) Livingston claims that $45,000 was initially disbursed at the closing in November 2000 and that he was promised he would be advanced the remaining $12,000 on the line of credit after he painted his home. (Livingston Dep., 62:12-63:11; R. ___.) Livingston further testified that he had the house painted and then verbally asked for the additional money but was told it could not be advanced. (*Id.* at 64:5-17; R. ___.) Viewing the allegations of the counterclaim in the light most favorable to Livingston, his alleged breach—that First Citizens had "prevented Defendant Livingston from exercising his rights to the full credit line subject of the Home Equity Line document"—occurred when he was denied the remaining $12,000 at the disbursement.[8] (Answer to Am. Compl., C.A. No. 2007-CP-38-196, at ¶ 48; R. ___.) At the latest, Livingston was on notice by the plain terms of the note that he had an obligation to seek reinstatement and, if First Citizens denied reinstatement of the full amount of credit, he could raise that violation. *See generally RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) ("Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence.").

In his breach of contract counterclaim in action 201, Livingston alleges that First Citizens breached the covenant of good faith and fair dealing by making inconsistent representations about the amount Livingston owed on the debt. (Am. Answer and Countercl., C.A. No. 2007-CP-38-201, at ¶¶ 19, 31-32; R. ___.) Summary judgment is appropriate on this claim because, under South Carolina law, a party who is in default on

[8] First Citizens expressly denies that the reduction in Livingston's credit limit constitutes a breach of the note.

a contract may not maintain an action for breach of contract premised on the implied covenant of good faith and fair dealing. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999).

Furthermore, both of Livingston's breach of contract counterclaims fail because he is not entitled to any actual damages. Livingston alleges that his damages from the breaches are not being able to use the full credit line and his costs of litigation. (Answer to Am. Compl., C.A. No. 2007-CP-38-196, at ¶ 49; Am. Answer and Countercl., C.A. No. 2007-CP-38-201, at ¶ 33; R. ___.) However, "[a] party cannot recover attorney's fees unless authorized by contract or statute," and Livingston has not identified a term of the note nor a statute entitling him to recover his fees and costs in defending the foreclosure actions. *Spriggs Grp., P.C. v. Slivka*, 402 S.C. 42, 52, 738 S.E.2d 495, 501 (Ct. App. 2013). Finally, even if Livingston had alleged any entitlement to monetary damages, he would not be able to recover any under South Carolina law because he is in default. *See Mozingo*, 379 S.C. at 484, 666 S.E.2d at 270 ("A party who seeks to recover damages for breach of a contract must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready and willing to perform it."). Accordingly, summary judgment is also appropriate on the breach of contract counterclaims because recoverable damages are unavailable.

D. Summary judgment is appropriate on Livingston's libel counterclaim because it is preempted and he failed to provide evidence that he incurred special damages.

1. The denial of a motion for summary judgment has no binding effect on a subsequent motion for summary judgment arguing new facts and law.

The circuit court denied First Citizens' motion for summary judgment on Livingston's libel counterclaim on the basis that a prior circuit court had previously denied a different motion for summary judgment and it lacked the authority to countermand that prior court's decision. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at 11; R. ___.) The circuit court's decision was an incorrect ruling of law and should be reversed.

On July 29, 2009, First Citizens moved for summary judgment on Livingston's counterclaim for libel, arguing that pleadings are absolutely privileged. (7/29/09 Mot. Summ. J., C.A. No. 2007-CP-38-196; R. ___.) On June 14, 2010, the circuit court for Orangeburg County denied First Citizens' motion for summary judgment on the libel counterclaim on the basis that there were genuine issues of material fact. (6/14/10 Order Granting Summ. J. in Part and Den. Summ. J. in Part, C.A. No. 2007-CP-38-196, at pp. 3-4; R. ___.) First Citizens again moved for summary judgment on October 19, 2012, arguing that summary judgment was appropriate because the libel claim was preempted by the FCRA and no false statements were made because Livingston admitted in his deposition that he was not current on the debt. (10/19/12 Mot. Summ. J., C.A. No. 2007-CP-38-196; 12/30/13 Mem. in Supp. of Summ. J.; R. ___.) The special circuit court judge denied summary judgment on Livingston's libel claim because "he believe[d] that

he lack[ed] authority to countermand" the 6/14/10 Order. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at p. 11; R. ___.)

"The denial of a motion for summary judgment does not bar a party from making a later motion for summary judgment based on matters not involved in the decision on the first motion." *Crosswell Enters., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992) (citation omitted). Similarly, granting a subsequent summary judgment motion does not countermand an earlier order denying summary judgment, and whether different circuit courts rule on the two motions has no effect. *See Smith v. Breedlove*, 377 S.C. 415, 421, 661 S.E.2d 67, 70 (2008) ("The fact that a different trial [court] previously denied a motion for summary judgment does not preclude the moving party from renewing its motion once new evidence is gathered."); *Dorrell v. S. Carolina Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) ("The trial judge had the discretionary authority to hear APAC's renewed motion for summary judgment. That a different trial judge previously denied the motion did not preclude APAC from renewing its motion once new evidence came to light.").

In the October 19, 2012 summary judgment motion, First Citizens asserted arguments with new factual and legal support that were not included in its July 29, 2009 summary judgment motion. Accordingly, the circuit court could decide the merits of First Citizens' summary judgment arguments with no deference to the June 14, 2010 order denying summary judgment on the libel counterclaim. The circuit court failed to do so, and because First Citizens is entitled to summary judgment on Livingston's counterclaim for libel for the reasons stated below, this Court should reverse the decision of the circuit court to deny summary judgment on Livingston's libel counterclaim.

2. State law claims against furnishers relating to their duty to provide accurate information are preempted by the Fair Credit Reporting Act.

Livingston's libel claim, which is premised on allegations that First Citizens willfully, maliciously, and recklessly published statements to credit reporting agencies that it was entitled to foreclose, is preempted by the federal Fair Credit Reporting Act ("FCRA"). (Answer to Am. Compl., C.A. No. 2007-CP-38-196, at ¶¶ 56-61; R. ___.) Accordingly, the circuit court incorrectly denied First Citizens' motion for summary judgment on Livingston's libel claim, and the entry of judgment in favor of First Citizens is appropriate.

The FCRA, which was enacted to ensure that credit reporting agencies would adopt procedures to ensure that information related to consumer credit would be provided fairly and accurately, has two preemption sections. 15 U.S.C. § 1681. The first preemption section, included in the original enactment of the FCRA in 1970, specifically preempts certain state law defamation claims:

> No consumer may bring any action or proceeding in the nature of defamation . . . with respect to the reporting of information against . . . any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1681h(e). In 1996, Congress amended the FCRA to further regulate "furnishers," which are entities that furnish "information relating to consumers to one or more consumer reporting agencies for inclusion in a consumer report." 12 C.F.R. §

1022.41(c). Section 1681s-2 was enacted to establish that furnishers have a duty to provide accurate information, and it prohibits furnishers from publishing information to a consumer reporting agency that the furnisher knows or has reasonable cause to believe is inaccurate. 15 U.S.C. § 1681s-2. According to the allegations of the libel counterclaim, First Citizens is a furnisher under the FCRA because it published consumer credit information to consumer reporting agencies. (Answer to Am. Compl., C.A. No. 2007-CP-38-196, at ¶¶ 57-58; R. ___.)

Simultaneously with the enactment of section 1681s-2, Congress enacted a specific furnisher preemption section:

> No requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies . . .

15 U.S.C. § 1681t(b)(1)(F). Accordingly, claims against furnishers regarding their duty to provide accurate information and to not provide inaccurate information falls within the subject matter of Section 1681s-2 and are preempted.

Therefore, Livingston's libel claim is preempted under section 1681t because it is within the subject matter regulated by section 1681s-2 regardless of whether it meets the malice exception under section 1681h. *See Purcell v. Bank of Am.*, 659 F.3d 622, 625 (7th Cir. 2011) (finding that state law defamation claim alleging that a furnisher willfully provided false credit information was preempted under section 1681t(b)(1)(F) regardless of whether it met the willful intent exception of section 1681h(e)); *accord Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45, 48 (2d Cir. 2011). As a result, entry of

summary judgment in favor of First Citizens is appropriate on Livingston's libel counterclaim.

3. Livingston failed to provide sufficient evidence to create a genuine issue of material fact on his counterclaim for libel.

To recover on his counterclaim for libel, Livingston must establish "(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Banks v. St. Matthew Baptist Church*, 406 S.C. 156, 161, 750 S.E.2d 605, 607 (2013). "[S]pecial damages are tangible losses or injury to the plaintiff's property, business, occupation or profession, capable of being assessed monetarily, which result from injury to the plaintiff's reputation." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510, 506 S.E.2d 497, 502 n.4 (1998) (citations omitted).

The Record contains no genuine issues of material fact that Livingston has suffered any special damages because of false credit reporting related to these two loans. The only evidence referenced in the Order as evidence of a genuine issue of material fact as to damages incurred by Livingston based on credit reporting is Livingston's testimony that he has "no credit." (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at 10; R. ___.) The Record contains no credit reports or any other evidence to show that any credit reporting harmed Livingston's reputation to cause monetary damages. Any variety of reasons might exist for Livingston's alleged poor credit and his bald statement, by itself, that he has "no credit" cannot create a genuine issue of material fact as to any allegedly false credit reporting by First Citizens. *See Brown v. Nat'l Home Ins. Co.*, 239 S.C. 488, 496, 123 S.E.2d 850, 854 (1962)

(holding that entry of directed verdict was appropriate on libel claim premised on publication of collection letter because the plaintiff failed to provide any evidence of special damages due to the letter); *see also Midland Mut. Life Ins. Co. v. Harrell*, 331 S.C. 394, 398, 503 S.E.2d 189, 191 (Ct. App. 1998) (granting summary judgment on libel counterclaim premised on false statements that the counterclaimant was in default because the counterclaimant provided no evidence that he was not in default at the time as to show whether the statements were true or false). Summary judgment in favor of First Citizens is appropriate for this reason as well.

Conclusion

Based on the above, this Court should reverse the circuit court's order denying First Citizens' demands for a bench trial and its motions for summary judgment on Livingston's counterclaims for alleged violation of the attorney preference statute, breach of contract, and libel. Reversing on either ground will permit the foreclosure action to proceed before the master-in-equity, as required by law. Should the court reverse the trial court's denial of summary judgment on the three remaining counterclaims, only First Citizens' foreclosure claims would remain.

[*signature page attached*]

Respectfully submitted,

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Columbia, South Carolina
January 28, 2015

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Court Judge

Case Nos. 2007-CP-38-0196 and Case No. 2007-CP-38-0201
Appellate Case No. 2014-001634

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

v.

Clyde B. Livingston, Technico Marketing & Distribution, Inc., B. Livingston and Charlotte V. Livingston, American First Federal, Inc., Citibank South Dakota, N.A., Branch Bank and Trust Company of South Carolina, G&G Rentals, Miler Communications, Wells Fargo Bank, N.A,..... Defendants,

Of whom Clyde B. Livingston is the ..... Respondent/Appellant,

And

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

v.

Clyde B. Livingston, American First Federal, Inc., Citibank South Dakota, N.A., Branch Bank and Trust Company of South Carolina, G&G Rentals, Miler Communications, Wells Fargo Bank, N.A., ... Defendants,

Of whom Clyde B. Livingston is the ..... Respondent/Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant/Respondent, do hereby certify that I have served all counsel in this action with a copy of the document(s) hereinbelow

specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Document(s): First Citizens' Initial Appellant's Brief

Counsel Served:

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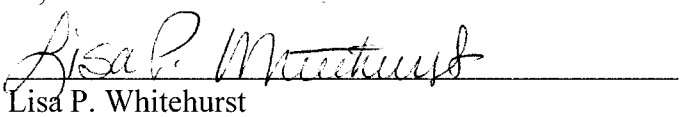

Lisa P. Whitehurst

January 28, 2015

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January 28, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: First Citizens Bank v. Clyde Livingston
Appellate Case No. 2014-001634
Our File 00689/01777

Dear Ms. Kitchings:

Enclosed please find the original and one copy each of First Citizens' Initial Appellant's Brief and First Citizens' Designation of Matter for Inclusion in the Record on Appeal. We would ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving them with copies of these pleadings.

Very truly yours,

A. Mattison Bogan

AMB:lpw
Enclosures
cc: Andrew S. Radeker, Esquire