THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Trial 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.

FIRST CITIZENS' RETURN IN OPPOSITION TO MOTION FOR PARTIAL DISMISSAL

Appellant/Respondent First Citizens Bank and Trust Company (the "Bank") files this opposition to the Motion for Partial Dismissal. This Court should summarily deny Respondent/Appellant Clyde B. Livingston's ("Livingston") motion.

Law/Analysis

Through his motion, Livingston seeks to have this Court, before briefing is complete and prior to any oral argument, dismiss the portion of the Bank's appeal related to the trial court's intertwined ruling on the Bank's motion for summary judgment as to Livingston's claims for breach of contract and libel.[1] Based on the authorities cited herein and the particularized reasoning arising out of the procedural posture of this action, this Court should deny the motion.

I. The South Carolina Supreme Court has recognized a limited exception permitting review of orders denying summary judgment.

Contrary to Livingston's arguments otherwise, our State Supreme Court has held that in rare circumstances, an appeal from a ruling denying summary judgment is appealable where there is a "need for final resolution." *Davis v. Lunceford*, 287 S.C. 242, 243, 335 S.E.2d 798, 799 (1985). This exception is specifically referenced in the Supreme Court's decision in *Olson v. Faculty House of Carolina, Inc.*, a case heavily relied upon by Livingston, which is the genesis of many of the other cases he cites. 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003). Livingston, however, fails to address or even acknowledge the exception.[2]

The potential application of the *Davis* exception, while rare, should not be ignored. In *Olson*, the South Carolina Supreme Court stated that "an order denying a

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[1] The trial court made clear that Livingston's counterclaim for an alleged attorney-preference violation was really a defense to be raised in the foreclosure and no affirmative relief could be had arising from such a defense. In doing so, the Court "denied" summary judgment. Hence, this issue, while cast as one relating to summary judgment, is a mode of trial issue and the court in equity will consider that defense.

[2] Prior to filing his alternative request for an extension on his initial response brief, counsel for Livingston emailed undersigned about whether the motion for partial dismissal would stay the briefing deadline. In response, the Bank provided details on the *Davis* case, among others. (*See* Exhibit 1, email.)

motion for summary judgment is not appealable[,]" however, "[t]he only recent exception to this rule by this Court was in a case prior to *Ballenger*, *Davis v. Lunceford* . . . in which we allowed the appeal of the denial of summary judgment to proceed in the third appeal of a medical malpractice action which had been pending for thirteen years." *Olson*, 354 S.C. 161, 167-68, 580 S.E.2d 443, 444 (2003). The Supreme Court's allowance of such review arose in *Davis* because addressing a simple, legal argument asserted in an appeal of the denial of summary judgment resolved the thirteen-year action. Livingston's casting of review of a denial as summary judgment as "never" being possible is inaccurate and fails to address the Supreme Court permitting review in instances like this appeal, where the Court may take review of related and other issues contained in the same order.

The exception presented by *Davis* should be examined in the context of this case after full briefing and argument is had. Livingston acquired both the second mortgage and the home equity line in November 2000, and he defaulted on the loans in or around August 27, 2006 and October 13, 2006, respectively. (Compl., C.A. No. 2007-CP-38-196, at ¶¶ 9, 17; Compl., C.A. No. 2007-CP-38-201, at ¶¶ 7-8, 17; R. ___.) First Citizens' foreclosure complaints were filed on February 15, 2007 and February 16, 2007. (Compl., C.A. No. 2007-CP-38-196; Compl., C.A. No. 2007-CP-38-201; R. ___.) The Record reflects that Livingston has since raised additional procedural hurdles to foreclosure, which have caused these actions to last over eight (8) years after Livingston defaulted on his obligations under the two mortgages—which were entered into

Livingston less than six (6) years before default.[3] This critical element of the passage of time has prevented the Bank from having its foreclosure actions finally adjudicated by bench trial by the court in equity, as provided by law—most recently, the Supreme Court's decision in *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). Years have been added to these foreclosure actions by, *inter alia*, the following actions:

- On December 26, 2007, Livingston filed a motion to reconsider the order granting his motions to amend. (Mot. Reconsider, C.A. No. 2007-CP-38-196; R. ___.) The motion was denied by orders dated August 4, 2008, eight months later. (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 14, 2009, Livingston asserted a counterclaim in action 196 alleging that First Citizens failed to provide a notice of right to cure, even though the notice was attached to the Complaint. (Answer to Am. Compl., C.A. No. 2007-CP-38-196; R. ___.) First Citizens filed motions for summary judgment on this claim on July 29, 2009 and, after no action was taken, again on March 15, 2010. (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; 3/15/2010 Mot. Summ. J., C.A. No. 2007-CP-38-196; R. ___.) By Order filed June 14, 2010, recovery on this claim was barred based on the statute of limitations, thirteen months after the factually meritless claim was first asserted. (6/14/10 Order Granting Summ. J. in Part and Den. Summ. J. in Part, C.A. No. 2007-CP-38-196; R. ___.)

- Also on May 14, 2009, Livingston asserted a counterclaim in action 196 alleging a violation of the Truth-in-Lending Act based on actions at the loan's closing in 2000, even though the claim had a three-year statute of limitations under 15 U.S.C. § 1635(f). (Answer to Am. Compl., C.A. No. 2007-CP-38-196; R. ___.) As above, the Bank was unable to secure an order resolving this claim until June 14, 2010.

- Because Livingston made arguments that Orangeburg National Bank closed the loan without attorney supervision, First Citizens moved to stay action 196 on October 27, 2010, pending the Supreme Court's decision in *Wachovia Bank, N.A. v. Coffey* [404 S.C. 421, 746 S.E.2d 35 (2013)]. (Mot. Stay Proceedings, C.A. No. 2007-CP-38-196; R. ___.) However, Livingston has since only pursued

[3] The Bank does not intend the inclusion of these procedural facts to be taken or perceived as an *ad hominem* attack. These are facts that are critical to the examination of whether finality should be had in this matter given its long history.

Orangeburg National Bank's alleged unauthorized practice of law through his South Carolina Unfair Trade Practices Act and attorney-preference violation claims in action 196.

- 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. ___.) Because of Livingston's changed grounds at the hearing, further briefing was required, and an order was not filed until April 17, 2014. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand; R. ___.)

- Both parties appealed the April 17, 2014 Order. (Notice of Appeal; Notice of Cross-Appeal; R. __.) After First Citizens filed its initial brief, Livingston filed the instant motion to dismiss and requested a stay of his deadline to file responsive briefing.

When viewed in the procedural history of this case, consideration of the application of the exception recognized by *Davis* is warranted. These foreclosure actions are entering the appellate process for the first time after eight years due to an order that granted summary judgment on a single counterclaim and failed to order a bench trial based on inconsequential language in an eight-year-old order granting motions to amend based on an incorrect interpretation of the law of the case doctrine.[4] (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand; R. ___.) Eight-year foreclosure actions, through which the debtor has continued to benefit from the use of the properties without paying the amounts owed on the loans, are even more deserving of review than a complex medical malpractice action that lasted thirteen years and went through the appellate system three times. *Davis* at 242, 335 S.E.2d at 799.

There will be no end in sight to these foreclosure actions unless this Court applies the straightforward legal arguments raised in First Citizens' Appellant's Brief to resolve

[4] *See* Section II, *infra.*

Livingston's facially insufficient counterclaims, given their undeniable connection to the law of the case rulings and the mode of trial issues—both of which, no matter the ruling on this motion, will be considered by this Court in this appeal. Since all of the rulings are in a combined order, the Court should address them all—even the denial of summary judgment. As argued more fully in First Citizens' Appellant's Brief, Livingston's libel counterclaim is unquestionably preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681t(b)(1)(F), so even if this Court strikes Livingston's jury demand, the libel claim will continue in this action despite being legally improper unless this Court grants summary judgment. Similarly, Livingston's allegations supporting his breach of contract counterclaims are barred by the statute of limitations and fail as a matter of law. This Court should not permit a debtor to raise legally insufficient counterclaims for nearly a decade in order to benefit from the free use of the property and leave the Bank delayed in obtaining its equitable recourse.

This Court may later conclude that the exception should not be applied to this case, but it should do so only after fully considering briefing on the issue. Partial dismissal is not warranted based on this Record. Like *Davis*, here, much time has passed since the bank commenced these foreclosure actions. And like *Davis*, this Court should consider the summary judgment rulings, in connection with the mode of trial issues presented, to bring this action to a swift resolution in a single proceeding before the master-in-equity at a bench trial.

II. The Court already must correct the other rulings contained in the trial court's Order also addressing summary judgment, which violate the rule contained in *Watson v. Underwood* and *Kinard v. Richardson*, among others, providing that the an order denying summary judgment does not give rise to the "law of the case."

An additional ruling that the Court must already consider, which is in the same order denying summary judgment, is the trial court's conclusion that it must deny First Citizens' motions to strike because it could not "countermand" another trial judge's prior ruling. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at pp. 11-13; R. ___.) The trial court denied summary judgment on Livingston's libel counterclaim for the same reason. (*Id.*; R. ___.) The trial court's order is wrong on these points, and the rulings, even though they are in the context of an order partially denying summary judgment, necessitate review because they touch upon the mode of trial issues at the very heart of this appeal, which is no doubt immediately appealable. This review is consistent with the undertakings of this Court in *Watson* and *Kinard*, as cited by Livingston. Given the dependant rationale between all of the rulings and that the trial court combined them in one order, the Court should review the portion of the order denying summary judgment as well.

Twice in the trial court's April 10, 2014 Order on summary judgment, the Court held that it could not "countermand" prior determinations by other trial courts on the basis that one trial judge cannot "over rule an order from another trial judge." (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at pp. 11-13; R. ___.) Based on this, the trial court concluded the prior rulings were the "law of the case." *Id.*

However, under South Carolina law, the denial of summary judgment "does not establish the law of the case." *Watson v. Underwood*, 407 S.C. 443, 457, 756 S.E.2d 155, 163 (Ct. App. 2014). The *Watson* court so held because it is well-established that "a judge deciding a case on the merits is not bound by a prior order of another judge denying summary judgment." *Id.* at 457, 756 S.E.2d at 162-63. Similarly, in *Kinard v. Richardson*, this Court noted that the law of the case doctrine did not apply to an order denying summary judgment. 407 S.C. 247, 263-64, 754 S.E.2d 888, 897 (Ct. App. 2014). Again, while declining to consider the ultimate issues in the order on the summary judgment motion, the Court in *Kinard* did note that the appellant was not barred by the law of the case doctrine and had the ability to raise the issue(s) at trial. *Id.* Accordingly, the trial court's additional ruling on the libel counterclaim is erroneous as a matter of law and has to be revisited in any event, no matter whether the Court considers the general denial of the summary judgment motion.

First Citizens recognizes that, under current South Carolina law as elucidated in *Olson*, the denial of summary judgment, alone, is not appealable. 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003). However, in determining whether an order is appealable, this Court has stated that it is required to "focus on the effect of the order, not the label given to the motion or to the order granting it." *Thornton v. S. Carolina Elec. & Gas Corp.*, 391 S.C. 297, 303, 705 S.E.2d 475, 478 (Ct. App. 2011). If the trial court's "law of the case" conclusion is allowed to stand, a paradox will no doubt be created. Going forward, any time that the Bank attempts to raise legal arguments against the counterclaims on which summary judgment or a motion to strike has previously been denied, Livingston will surely argue that the trial court must deny those arguments on the basis that the prior

denial was the law of the case (even though the law prevents such tactics). In effect, the trial court's belief that the prior denial became the law of the case will enable Livingston to act as if it is true.

This Court stated that the reason why summary judgment is not appealable is because the motion may be raised again later in the proceedings. *Id.* Here, because of the trial court's rationale, Livingston will contend that it is no longer the case. In *Watson*, this Court addressed a related issue in the context of denial of summary judgment without dismissing the appeal. The Court considered the order on summary judgment and clarified that findings of law in the order denying summary judgment would not bar the appellant from arguing any legal issues at the later trial. *Watson* at 457, 756 S.E.2d at 163. The Court will no doubt have to do the same here no matter the ruling on this motion. But this appeal requires a further step, as the trial court in *Watson* had not relied on the "law of the case" doctrine to deny summary judgment. Here, an affirmative ruling is required to correct the erroneous findings of law, which, without appellate review, will have the effect of Livingston seeking to bar First Citizens from arguing legal issues at trial.

Essentially, Livingston attempts to shield himself from the general rule that summary judgment orders are not reviewable in order to benefit from the clearly incorrect statements of law contained in the April 10, 2014 Order in an effort to prevent the Bank from raising the issues again. These errors must be corrected, even if all of the rulings pertaining to the denial of summary judgment are not reviewed. If the Court does grant the motion for partial dismissal, it should note that the law of the case doctrine is not applicable to this proceeding or the summary judgment orders, as exemplified by

Watson and *Kinard*. Short of a ruling of a similar fashion by this Court, Livingston will no doubt seek to benefit from the trial court's erroneous rulings as to "law of the case" to later claim the Bank is barred from litigating certain issues, and if the Bank had failed to appeal this point, Livingston would have no doubt attempted to argue that the time for appellate review of this ruling had passed. This Court should prevent such procedural gamesmanship no matter the label placed on the motions or orders at issue in this appeal. *See Thornton* at 303 n. 6, 705 S.E.2d at 478 (noting "our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability" (internal citations omitted)).

Therefore, the trial court's ruling as to "law of the case" is also necessarily intertwined with the mode of trial issues immediately before the Court and the denial of summary judgment on the contract and libel claims. Hence, at the very least, this Court must correct the incorrect statements of law in the above cited Order on the basis that the Bank is not bound by the "facts" or "conclusions" in the orders denying summary judgment contrary to the trial court's Order and the position taken by Livingston below. For this reason too, the motion should be denied and consideration of the orders in full must be had on review of this appeal.

III. This Court should not rule on the issue as presented by Livingston at this stage of the appeal.

Each and every case cited by Livingston is in the procedural posture of a final decision ***after*** briefing and argument. *See, e.g.*, *Watson* at 460, 756 S.E.2d at 164; *Kinard* at 263-64, 754 S.E.2d at 897; *Thornton* at 304-05, 705 S.E.2d at 479. This Court should not give Livingston's special or different treatment here.

The reason each cited decision is after full consideration of the issues is (1) because the Court will, under *Davis*, determine if an order denying summary judgment should be reviewed and (2) this Court will correct inaccurate "law of the case" determinations made in orders denying summary judgment. Rather than brief the issue, Livingston seeks to avoid having to address the deficiencies in the trial court's ruling by casting the Bank as having appealed the numerous and layered summary judgment errors unjustly.

Conclusion

This Court should deny the motion for partial dismissal and order Livingston to file his Respondent's brief.[5]

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

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[5] As demonstrated by Exhibit 1, undersigned takes no position on whether the filing of a partial motion to dismiss stays Livingston's briefing deadline and leaves that issue to the Court. Undersigned notes that no matter the ruling on the instant motion, this appeal will not be ended as the mode of trial issues (*i.e.*, bench trial vs. jury trial) in this foreclosure action remain.

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

Columbia, South Carolina
February 24, 2015

Exhibit 1

Lisa Whitehurst

Subject: FW: First Citizens v. Livingston

From: Matt Bogan
Sent: Thursday, February 05, 2015 5:06 PM
To: 'Drew Radeker'
Cc: Erik Norton; Tara Sullivan
Subject: RE: First Citizens v. Livingston

Drew, thanks for your note. I hope you and your family are well.

I am not going to take any contrary position to you on the stay or try to play "gotcha" on a briefing deadline but I plan to file my response brief by the current deadline as I am not sure, like you, that we are in a clearly defined area. You may be right that all is stayed under the Rule but that will be for the Court to decide I reckon based on your attempt to gain partial dismissal. Cannot fathom to predict what the Court may do with it but we will oppose your motion to dismiss.

You correctly recognize that the mode of trial issue (*i.e.*, the bank's lawful right to a bench trial as envisioned by section 29-3-660 and as most recently noted and re-affirmed by our Supreme Court in *TD v. BADD*) is unquestionably immediately appealable. Just like you are not trying to talk me into it, I am not trying to talk you out of it but you should note the cases cited on the intertwined orders doctrine. You can read them now or in our response in opposition to any partial motion to dismiss. Our appellate courts can, will, and do consider wrongly decided summary judgment denials in connection with other immediately appealable issues. Like these examples cited herein--noting exceptions to the general rule I am certain you will try to reply upon: *Morris v. Anderson County*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (stating 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"); *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985) (considering an appeal of the denial of summary judgment to proceed in the third appeal of a medical malpractice action which had been pending for thirteen years); *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); *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) (considering the denial of a motion for summary judgment and reversing the denial to end unnecessary litigation).

The courts' practice in permitting such review is to end unnecessary litigation as is often judicially economical to do. We think these 2007 cases should be ended and the rulings, while the mode of trial is on appeal, should be considered given the logical and intertwined nature of the issues. That will continue to be our position before any appellate court(s).

Matt Bogan
803-255-9589

From: Drew Radeker [mailto:Drew@harrisonfirm.com]
Sent: Thursday, February 05, 2015 12:38 PM
To: Matt Bogan
Cc: Erik Norton; Tara Sullivan
Subject: First Citizens v. Livingston

Matt:

I have taken a look at your appellant's brief in this appeal, and I see that First Citizens is appealing the denial of summary judgment. I plan to make a motion to dismiss the appeal to the extent that it appeals the denial of summary judgment because that's not an appealable decision. (I am sure that's not coming as a surprise to you, and I'm not asking you to agree to such a dismissal.) Since that's a motion to dismiss the appeal, even though it's not for the *entire* appeal, I believe that the other deadlines in the appeal will be stayed by the motion under Rule 240(b). Do you agree that the other deadlines would be stayed? I'm just trying to figure out if I need to address that with a motion, too.

Let me know. Thanks.

Drew Radeker

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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

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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' Return in Opposition to Motion for Partial Dismissal

Counsel Served:

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Lisa P. Whitehurst

February 24, 2015

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February 24, 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 seven copies of First Citizens' Return in Opposition to Motion for Partial Dismissal in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this Return.

Very truly yours,

Matt Bogan

A. Mattison Bogan

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