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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 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' Petition for Rehearing and/or Clarification  
of the Court's April 13, 2015 Order**

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First Citizens very respectfully submits this petition for rehearing and/or clarification of the Court's April 13, 2015 Order pursuant to Rules 221 and 240, SCACR. A mistake has been made concerning this appeal that necessitates administrative correction prior to any inadvertent issuance of the remittitur. The path to correction is straightforward. No harm has come of the mistake to date and it can be remedied immediately.

First Citizens, with the express consent and joint agreement of Livingston, files this petition. (*See* Exhibit A, Livingston's consent to rehearing.) The Court's Order on April 13, 2015 appears to have dismissed the entirety of First Citizens' appeal rather than only the grounds for appeal relating to the appeal of the trial court's denial of summary judgment. If this was the intent of the Order, it was in error for the reasons specified herein. If the Order did not intend to dismiss the entirety of First Citizens' appeal, the Court should amend or clarify its order to provide that Livingston's Respondent's brief is due May 13, 2015, which is 30 days from the date of the Order granting his motion for partial dismissal. As indicated by Exhibit A, counsel for Livingston consents to this petition for rehearing and/or clarification.

#### **Background/Analysis**

On July 25, 2014, First Citizens filed its notice of appeal. On July 29, 2014, Livingston cross-appealed. First Citizens appealed two issues to this Court: first, whether the trial court erred by denying First Citizens its proper mode of trial in this foreclosure action (*i.e.*, a bench trial), and second, whether the trial court erred by denying First Citizens' motion for summary judgment on Livingston's counterclaims for violation of the attorney preference statute, breach of contract, and libel. (Exhibit B, First Citizens' Initial Appellant's Brief at pp. 1; 10-22; 25-34.) The two issues were addressed in one joint order by the trial court but arose out of two independent motions filed by First Citizens on two separate issues.

Next, on February 16, 2015, Livingston filed a motion seeking *partial* dismissal of First Citizens' appeal. (Exhibit C, Livingston Motion for Partial Dismissal.) Livingston sought only to dismiss the second issue on appeal concerning summary judgment on the grounds that a denial of summary judgment is not immediately appealable. (*Id.* at p. 1.) First Citizens opposed the motion for partial dismissal. Pursuant to Rule 240(b), SCACR, Livingston had not filed his Respondent's brief addressing the jury demand issue.

On April 13, 2015, this Court issued an order dismissing First Citizens' entire appeal and making Livingston the primary appellant—which includes the dismissal of the primary issue concerning the proper mode of trial in this foreclosure action. This ruling, if what the Court intended, must be remedied as it was mistakenly issued.

First, Livingston only sought partial dismissal. He specifically only sought dismissal of the issues concerning First Citizens' disagreement with certain rulings arising out of the denial of summary judgment. (*See* Ex. C at p. 1 (“Respondent/Appellant hereby moves . . . for an order that dismisses Appellant/Respondent's appeal **to the extent that it is an appeal of the denial of summary judgment . . .**”) (emphasis added).) In its April 13, 2015 Order, this Court held those rulings to be not appealable. It would seem the Court also dismissed, without motion or notice, First Citizens' grounds for appeal concerning mode of trial. Livingston, however, did not seek dismissal of the primary issue concerning mode of trial. Livingston agrees with First Citizens that the primary issue should remain before this Court. Hence, if this Court intended its Order to dismiss the entirety of First Citizens' appeal, the Court must amend or correct its Order.

Second, First Citizens properly appealed from the trial court's ruling it was not entitled to a bench trial on the claims arising out of this foreclosure action. There is no question under South Carolina law that mode of trial issues are immediately appealable. *See, e.g., Lester v.*

*Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 23, 431 S.E.2d 587, 590 (1993); *Pelfrey v. Bank of Greer*, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978); *Frampton v. S. Carolina Dep't of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 274 (Ct. App. 2013). “Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Lester* at 266, 491 S.E.2d at 241. Thus, First Citizens was required by South Carolina law to appeal the mode of trial issue, and this Court cannot dismiss the issue without notice on the basis that it is not immediately appealable.

Thus, if the Court’s Order intentionally ended the entirety of First Citizens’ appeal, the Court should grant this petition to correct this mistake of law given the presence of the primary, immediately appealable mode of trial issue beyond the secondary summary judgment issue that the Court’s Order addressed. If the Court inadvertently overlooked the primary issue being appealed and did not intend to dismiss First Citizens’ appeal of the trial court’s order denying First Citizens of its protected mode of trial, then the Court should correct the Order to reinstate First Citizens’ appeal on the mode of trial issue. The following briefing should remain<sup>1</sup> on First Citizens’ appeal concerning mode of trial:

May 13, 2015: Livingston’s initial Respondent’s brief due;

May 25, 2015: First Citizens’ reply brief due;

June 24, 2015: First Citizens to file the Record on Appeal; and

July 14, 2015: First Citizens and Livingston to file final briefs.

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<sup>1</sup> This Court’s order mentions Livingston’s reply brief as being due but it has already been filed. It is Livingston’s Respondent’s brief in First Citizens’ appeal that is due, which is another layer of confusion contained in the Court’s Order.

Accordingly, at a minimum, the Court should clarify the remaining briefing schedule on the primary issue in First Citizens' appeal, thereby indicating its Order did not dismiss this issue from the appeal.

### **Conclusion**

This Court should issue an order granting rehearing and/or amending or clarifying its original order to provide that First Citizens' appeal remains before the Court as to the primary issue concerning the mode of trial, and only those secondary issues touching upon summary judgment rulings are no longer before the Court. The Court should further order or note that the remaining deadlines in this matter are as set as forth above, pursuant to Rules 208, 210, and 211, SCACR. The parties will not seek further extensions.

Should the Court not rehear or clarify the issue, the parties will jointly seek certiorari as the mode of trial issues must be decided prior to the trial of this matter or else both parties risk extreme prejudice.

*[signature page attached]*

Respectfully submitted,

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Columbia, South Carolina  
April 17, 2015

# **Exhibit A**

*Livingston's consent to rehearing*

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

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Common Pleas Case Nos. 2007-CP-38-196 & 2007-CP-38-201  
Appellate Case No. 2014-001634

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First Citizens Bank and Trust Company,.....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 Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

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

And

First Citizens Bank and Trust Company,.....Respondent,

v.

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

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

---

CLYDE B. LIVINGSTON'S CONSENT TO REHEARING AS TO DISMISSAL OF  
FIRST CITIZENS BANK AND TRUST COMPANY'S APPEAL OF DENIAL OF  
ITS MOTION TO STRIKE JURY DEMAND

---

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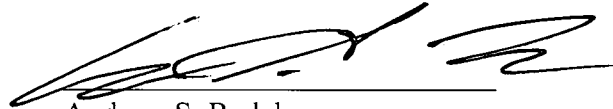
Appellant (hereinafter “Livingston”) hereby notes his consent to the Respondent (hereinafter “First Citizens”)’s petition for rehearing being granted to restore First Citizens’ appeal of the denial of its motion to strike Livingston’s jury demand. Further, Livingston joins in that petition. To the extent the court’s order dismissed First Citizens’ appeal of the denial of its motion to strike the jury demand, the order should be undone. To the extent that Livingston and First Citizens are misreading the court’s order, Livingston agrees with First Citizens that clarification of the order is warranted.

While Livingston is pleased that the court granted his motion to dismiss First Citizens’ appeal of the denial of its summary judgment motion, Livingston only sought dismissal of *that* portion of First Citizens’ appeal. Livingston never sought the dismissal of First Citizens’ appeal of the denial of its motion to strike Livingston’s jury demand. Because he did not seek dismissal of First Citizens’ entire appeal, Livingston expected to have to serve a brief as a respondent to First Citizens’ appeal. That is why he included in his motion a request, to the extent necessary given Rule 240’s stay of time limits during the pendency of a motion to dismiss an appeal, for an extension of time to serve that brief to 30 days from the issuance of the order on his motion. The way Livingston saw it is that First Citizens appealed two decisions, one of which is appealable (the denial of the motion to strike the jury demand) and one of which is not (the denial of the motion for summary judgment).

While Livingston does not agree with the substance of First Citizens’ appeal of the denial of its motion to strike Livingston’s jury demand, Livingston agrees that that denial is something First Citizens can appeal. Accordingly, Livingston consents

to First Citizens' petition for rehearing being granted to restore First Citizens' appeal of the denial of that motion.

Respectfully submitted,



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April 16, 2015

# **Exhibit B**

*First Citizens' Initial Appellant's Brief*

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Wells Fargo Bank, N.A., .....

Defendants,

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

**FIRST CITIZENS' INITIAL APPELLANT'S BRIEF**

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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”).<sup>1</sup> (Compl., C.A. No. 2007-CP-38-196; Compl., C.A. No. 2007-CP-38-201; R. \_\_\_\_.) On March 27, 2007, Livingston answered the

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<sup>1</sup> 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.<sup>2</sup> (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. Plaintiff's 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,

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<sup>2</sup> 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.<sup>3</sup> (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.

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<sup>3</sup> 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.<sup>4</sup>

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<sup>4</sup> 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), SCRPC. 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.<sup>5</sup> *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.

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<sup>5</sup> 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.<sup>6</sup> 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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<sup>6</sup> 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.<sup>7</sup> 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

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<sup>7</sup> 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 eliminate 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 Mazingo & 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.<sup>8</sup> (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

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<sup>8</sup> 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 Mazingo*, 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

# **Exhibit C**

*(Livingston Motion for Partial Dismissal)*

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

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Common Pleas Case Nos. 2007-CP-38-196 & 2007-CP-38-201  
Appellate Case No. 2014-001634

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First Citizens Bank and Trust Company,.....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 Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

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

And

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

v.

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

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

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MOTION FOR PARTIAL DISMISSAL  
OF APPELLANT/RESPONDENT'S APPEAL  
AND MEMORANDUM IN SUPPORT

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Attorney for Respondent/Appellant

Respondent/Appellant hereby moves pursuant to Rules 201 and 260, SCACR, and all other applicable law, for an order that dismisses Appellant/Respondent's appeal to the extent that it is an appeal of the denial of summary judgment, which is not appealable. The grounds for this motion are set forth below.

**The denial of summary judgment is never appealable.** As Appellant/Respondent's initial brief makes plain, one of the things Appellant/Respondent is appealing is the denial of its summary judgment motion. That simply cannot be done.

Appellant/Respondent cites Watson v. Underwood, 407 S.C. 443, 459, 756 S.E.2d 155 (Ct. App. 2014), and Morris v. Anderson Cnty., 349 S.C. 607, 564 S.E.2d 649 (2002), for the proposition that the denial of summary judgment is appealable where an appealable issue is before the court. This is incorrect for a couple of reasons.

To the extent that Morris stood for this proposition, it was overruled by Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003). In Olson, the Supreme Court definitively clarified that the denial of summary judgment is not appealable, ever, even when an indisputably appealable issue is before the court, and overruled cases that had held to the contrary. Id. at 168 & n. 8. That is borne out by the decisions in this area that have been issued since Olson, for example, Fisher v. Stevens, 355 S.C. 290, 298, 584 S.E.2d 149 (Ct. App. 2003) ("denial of a motion for summary judgment is not directly appealable, even after final judgment"), Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486, 504 (Ct. App. 2006) (order denying motion for summary judgment not appealable), Proctor v. Whitlark, 406 S.C. 225, 226 n. 1, 750

S.E.2d 93, 93 n. 1 (Ct. App. 2013) (“orders denying summary judgment are not appealable”), and Sims v. Amisub of S.C., Inc., 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014) (same). The cases cited in Olson as being expressly overruled, 354 S.C. at 168 & n. 8, were cases in which appellate review of an order denying summary judgment was undertaken on the grounds that another, appealable issue was before the court – the same thing that Appellant/Respondent now asks this court to do. Tanner v. Florence City-Cnty. Bldg. Comm’n., 333 S.C. 549, 553, 511 S.E.2d 369 (Ct. App. 1998); Anthony v. Padmar, Inc., 307 S.C. 503, 513, 415 S.E.2d 828, 835 (Ct. App. 1991); Garrett v. Snedigar, 293 S.C. 176, 183 n. 2, 359 S.E.2d 283, 287 n. 2 (Ct. App. 1987).

Because, even after Olson, litigants have repeatedly attempted to do what the Appellant/Respondent is attempting to do now, this court has had a number of occasions to issue reminders of the law in this area. In 2011, this court noted that an order denying summary judgment “is not appealable under any circumstance.” Thornton v. SCE&G, 391 S.C. 297, 301, 705 S.E.2d 475, 477 (Ct. App. 2011). Last year, citing Olson, this court made note of the fact that an order denying summary judgment “is never appealable.” Kinard v. Richardson, 407 S.C. 247, 754 S.E.2d 888, 897 (Ct. App. 2014).

Watson v. Underwood, the very case cited by Appellant/Respondent, is one of those reminder decisions. 756 S.E.2d at 160, 162-63. One of the trial court’s decisions Watson attempted to appeal in that case was the denial of a summary judgment motion. Id. This court adhered to the Supreme Court’s controlling precedent, noting that “[b]ecause the denial of a motion for summary judgment

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cannot be appealed, we cannot consider this issue.” Id. at 163. The ordinarily unappealable order that the court noted it could have considered (but did not) in Watson was the denial of a petition to terminate a trust. Id. at 163-64.

The denial of summary judgment is not just *ordinarily* unappealable; it “is never appealable.” Kinard, 754 S.E.2d at 897. Appellant/Respondent’s appeal of the denial of summary judgment simply will not lie.

**The court should not be taken in by Appellant/Respondent’s unwarranted *ad hominem* attack.** Appellant/Respondent writes that “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,” stating that the court should review and reverse an unappealable decision for that reason. (Initial Appellant’s Brief of Appellant/Respondent p. 24.)

First, these foreclosure actions have not been pending for seven years because Respondent/Appellant made that so. This is Appellant/Respondent’s case, in the sense that it brought the case, not Respondent/Appellant. If neither the circuit court nor Appellant/Respondent has taken steps to bring the case to a conclusion, that is not because Respondent/Appellant has done something to prevent them from doing that. To what “tireless re-pleading” does Appellant/Respondent refer? Respondent/Appellant made a motion to amend, which was granted, years ago, and then pled in response to Appellant/Respondent’s amended complaints. What “procedural machinations” have been foisted on Appellant/Respondent in this case? Respondent/Appellant demanded a jury trial on his counterclaims and, years ago, the

master-in-equity ruled that he was entitled to one. The master-in-equity, years ago, bifurcated the case, over Respondent/Appellant's objection. It is Appellant/Respondent who brought this appeal, not the other way around. In its zeal to demonize Respondent/Appellant, Appellant/Respondent has accused him of "tireless re-pleading and procedural machinations" that he has not undertaken.

Second, Appellant/Respondent has engaged in the logical fallacy of an *ad hominem* attack. "*Ad hominem* arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names ('Jane you ignorant etcetera . . .') only shows the paucity of your own reasoning." Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 2002). Appellant/Respondent probably does not like Respondent/Appellant much, but the merits of neither party's character is at issue in this appeal.

**Briefing on the merits of whether Appellant/Respondent should have been granted summary judgment would be inefficient, costly, and purposeless.** Sometimes, this court has dealt with issues of appealability that motions have brought before the court by declining to dismiss the appeal but directing the parties to address the issue in their briefs. That is not what the court should do here with regard to the portion of Appellant/Respondent's appeal that seeks review of the denial of summary judgment.

For Respondent/Appellant's counsel to devote time and energy to briefing the merits of why the circuit court was right to deny Appellant/Respondent summary judgment would be a significant waste of that time and energy, as it would ultimately

prove to be just an exercise in futility. The court, bound by precedent, would not reach the issue. For the court to read the portions of the parties' briefs that would deal with whether Appellant/Respondent should have been granted summary judgment would be similarly pointless, a poor use of judicial resources. For Respondent/Appellant to incur the increased cost of having printed and bound multiple copies of a brief that has been necessarily lengthened by his counsel's argument, made just to be safe, on the merits of that issue would be nothing more than a waste of money. No one, not even Appellant/Respondent, is well served by the parties' briefing the issues surrounding whether the circuit court was right to deny summary judgment. (Respondent/Appellant would have no problem with the court allowing Appellant/Respondent to omit the section of its initial brief that deals with the denial of summary judgment from its final brief, thus shortening Appellant/Respondent's brief, as well.)

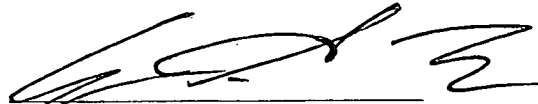
Respondent/Appellant should not have to brief (and this court should not have to read briefs on) the issues raised by an appeal of something that "is not appealable under any circumstance." Thornton, 391 S.C. at 301.

**Time.** Respondent/Appellant believes that the pendency of this motion stays all deadlines in this appeal pursuant to Rule 240(b), SCACR; however, to the extent necessary, Respondent/Appellant moves for an extension of his time to serve and file an initial respondent's brief (and designation of matter to be included in the record on appeal) to Appellant/Respondent's appellant's brief to 30 days from the issuance of the order that decides this motion or such other reasonable deadline as this court sets. For the reasons discussed above, there is good cause for such an extension.

**The court should publish an order granting this motion.** Though this court does not typically publish its orders on motions, it certainly can. The Appellate Court Rules contemplate that occasionally orders, not just opinions, will be published. See Rule 268(d)(1), SCACR. This is a proper situation for the court to publish its order granting this motion to dismiss. Apparently, there is a significant portion of the bar that needs to be again reminded that “orders denying summary judgment are not appealable.” Proctor v. Whitlark, 406 S.C. at 226 n. 1.

WHEREFORE Respondent/Appellant prays for an order dismissing Appellant/Respondent’s appeal to the extent that it is an appeal of the denial of summary judgment.

Respectfully submitted,



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Attorney for Respondent/Appellant

February 14, 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

APR 17 2015

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

**SC Court of Appeals**

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**

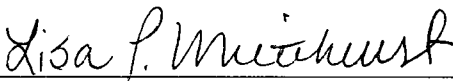
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins  
Riley & Scarborough LLP, attorneys for Appellant/Respondent, do hereby certify that I  
have served all counsel in this action with a copy of the document(s) hereinbelow

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

Document(s): First Citizens' Petition for Rehearing and/or Clarification of the Court's April 13, 2015 Order

Counsel Served:

Andrew S. Radeker, Esquire  
Harrison & Radeker, P.A.  
PO Box 50143  
Columbia, SC 29250

  
\_\_\_\_\_  
Lisa P. Whitehurst

April 17, 2015

# Nelson Mullins

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April 17, 2015

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SC Court of Appeals

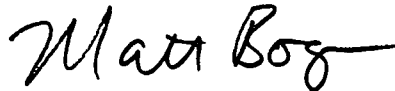
The Honorable Jenny Abbott Kitchings  
Clerk of Court  
SC Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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

Dear Ms. Kitchings:

Attached please find the joint and consent First Citizens' Petition for Rehearing and/or Clarification of the Court's April 13, 2015 Order for filing along with the filing fee. The parties request the Court reinstate First Citizen's primary issue on appeal that the Court appears to have overlooked in dismissing the entire appeal when only a partial motion to dismiss was filed. Undersigned and counsel for Livingston are happy to provide further information to the clerk or the Court about this issue which the parties believe was merely an administrative mistake.

Very truly yours,



A. Mattison Bogan

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