THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 20 2015
S.C. Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,.....Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is the.....Petitioner.

PETITION FOR WRIT OF CERTIORARI AND MEMORANDUM IN SUPPORT

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner

Other counsel of record in appeal:

Sean A. O'Connor, Esq.
Finkel Law Firm, LLC
Post Office Box 41489
Charleston, South Carolina 29423
(843) 577-5460
Attorney for Respondent

Petitioner Kelley Burr, who was the Appellant below and is hereinafter, sometimes, referred to as "Burr," hereby moves and petitions this Court, pursuant to Rule 242, SCACR, as well as all other applicable law, for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in this case. Petitioner respectfully submits that this is a proper case for such review by this Court, as the decision of the Court of Appeals, which is at odds with this Court's jurisprudence and the Court of Appeals' own jurisprudence, applies a summary judgment analysis to this case when no motion for summary judgment was ever made to the circuit court, misconstrues and misapplies the law of mootness, uses a methodology to reach the conclusion to affirm that is not in accordance with any court rule, statute, or case law, fails to apply controlling precedent, and reaches a result that is opposite of that required by law, as is noted in the memorandum below. One of the ways this case is important is that it is about how the courts of South Carolina are to determine whether a fact has been proven, as the circuit court below simply accepted the unsworn words of counsel for the Respondent (hereinafter "U.S. Bank") as proof of facts, in the complete absence of a factual record.

This is also a particularly appropriate case for review by this court because the questions presented by this case involve the operation and application of In re: Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01) (hereinafter "the Administrative Order"), which has never been addressed in a published appellate opinion in this state. The underlying decision by the circuit court to dismiss Burr's counterclaims and strike her defenses, which the Court of Appeals affirmed, violates both the letter and the spirit of the Administrative Order. In the event that the foreclosure intervention process

under the Administrative Order does not result in a settlement of the foreclosure action, the Administrative Order provides that the case is to proceed, not that anyone's claims or defenses are to be done away with. The circuit court's action and its affirmance by the Court of Appeals works prejudice to Burr in ways never intended or contemplated by the Administrative Order.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on February 25, 2015. Counsel for the Petitioner certifies that the petition for rehearing was served and filed 15 days later, on March 12, 2015, and was finally ruled on by the Court of Appeals by an order that on its face reflects that it was filed on June 18, 2015. (Appx. pp. 1, 4, 18.) By letter dated June 23, 2015, the Court of Appeals stated that "[t]he time for filing a petition for writ of certiorari will be calculated from the date of this letter." (Appx. p. 33.) Regardless of whether the operative date is June 18 or June 23, however, the instant petition is timely: since July 18, 2015, was a Saturday, under Rule 263(a), SCACR, a 30-day period that follows June 18, 2015, runs through today, July 20, 2015.

QUESTIONS PRESENTED

The questions presented for review in this case, which closely relate and discussed in detail below, may be succinctly stated as follows:

1) Did the Court of Appeals err in affirming a circuit court decision in this case that struck Burr's defenses and dismissed her counterclaims where neither the circuit court's analysis in reaching its decision nor the Court of Appeals' analysis in affirming that decision square with any rule, statute, or other law that permits the dismissal of any claim or the striking of any defense?

2) Did the Court of Appeals err in striking and dismissing Burr's defenses and counterclaims for failure to prosecute or to comply with a court order where the court's

only asserted basis for doing so was Burr's failure participate in the foreclosure intervention process?

3) Did the Court of Appeals err in affirming the circuit court on the basis that U.S. Bank's motion was converted into one for summary judgment, where there is nothing in the record indicating such a conversion occurred or would have been proper?

4) Did the Court of Appeals err in affirming the circuit court's determination that Burr's counterclaims were moot a) in the absence of any factual record and b) where her claims, and at least her claim for damages, were not shown to be moot?

STATEMENT OF THE CASE

U.S. Bank sued Burr, filing a summons and complaint seeking foreclosure of a mortgage on November 1, 2010. (Appx. pp. 102-08.) Burr answered and counterclaimed through her then-counsel, David P. Reuwer, Esquire. (Appx. pp. 109-16.) Burr's defenses and counterclaims centered on common factual allegations that "Burr and her husband provided [U.S. Bank] and/or its successor trustee with detailed information and documentation upon request of [U.S. Bank,]" that U.S. Bank's authorized agents and employees "stated and represented to [Burr] that she would be taken care of not losing her residential home so long as she participated in the Home Affordable Modification Program [(hereinafter 'HAMP'),]" that Burr "did cooperate and agree to participate in [HAMP,]" and that U.S. Bank "did not conduct a fair, reasonable, comprehensive analysis nor reconsideration of her home mortgage payment amount problem, and that the Plaintiff never intended to actually do so." (Appx. pp. 110-11.) Burr pled defenses and counterclaims labeled as "unclean hands," "breach of contract," "fraud and misrepresentation in the inducement," "unfair trade practices," "in pari delicto," and "residential home." (Appx. pp. 111-14.) Burr alleged U.S. Bank "breached the terms of the contract [evidenced by the note and mortgage]

and its duty to service the agreement in good faith" and that U.S. Bank "stated and represented over time and telephone calls and correspondence that it would reconsider and help [Burr] into an affordable loan modification, such that she would not lose her residential home." (Appx. pp. 112, 113.) U.S. Bank pled numerous defenses to Burr's counterclaims. (Appx. pp. 117-24.) Those defenses did not include mootness. (Appx. pp. 117-24.)

On May 2, 2011, Chief Justice Jean H. Toal of the Supreme Court of South Carolina issued the Administrative Order, which sets out a framework for notifying mortgagor defendants in actions seeking mortgage foreclosure of owner-occupied dwellings of those defendants' right to foreclosure intervention. In re: Mortgage Foreclosure Actions, 396 S.C. at 211-14. The Administrative Order also sets forth a process for the conclusion of foreclosure intervention efforts, generally in one of three ways: 1) successful settlement of the claim for foreclosure through foreclosure intervention, 2) good-faith attempts to settle the foreclosure claim that do not succeed in resolving the foreclosure, despite the participation of both mortgagor and mortgagee in the foreclosure intervention process, and 3) failure of the mortgagor defendant to participate in the foreclosure intervention process, either through failure to respond to the notice of right to foreclosure intervention at all or through completion of the foreclosure intervention process in a way that does not result in resolution of the foreclosure because of the mortgagor's failure to provide necessary information. Id. U.S. Bank served Burr's then-counsel with a notice of right to foreclosure intervention on July 25, 2011. (Appx. pp. 172-77.) U.S. Bank's counsel and Burr's attorney at that time communicated about the notice, and U.S. Bank re-sent the notice on August 9, 2011. (Appx. p. 178.) On October 26, 2011, U.S. Bank's counsel served a certification that Burr had "failed, refused, or voluntarily elected not to participate in any foreclosure

intervention process[,]" stating that despite U.S. Bank extending the deadline for Burr to submit documents and records for evaluation in the foreclosure intervention process, "[n]o documents or records were ever received by [U.S. Bank's] counsel." (Appx. pp. 178-80.)

On April 17, 2012, U.S. Bank served the motion that is subject of this appeal, stating that Burr "has failed to prosecute and even has defeated her own counterclaims by not responding to [U.S. Bank's] efforts to offer her a loan modification proposal, in addition to not providing information to allow consideration of Burr for a modification. Therefore, pursuant to Rule 12(c), 12(f), and 41(b), S.C. Rules of Civil Procedure, U.S. Bank hereby moves to dismiss Burr's counterclaims and to strike her defenses." (Appx. pp. 126-42.) The motion asserted that Burr's defenses and counterclaims against U.S. Bank are "all based primarily on an alleged failure to 'conduct a fair, reasonable, comprehensive analysis' and 'reconsideration of her home mortgage amount problem[,]'" contended that Burr failed to prosecute her claims by failing to engage in the foreclosure intervention process, and contended that Burr's claims were moot because U.S. Bank had offered Burr a modification proposal on January 10, 2012, to which offer she never responded. (Appx. pp. 126, 129-30.) Attached to the motion were the certification of mortgagor noncompliance that U.S. Bank had already filed and printouts of email messages between U.S. Bank's attorney, that lawyer's paralegal, and Burr's then-counsel. (Appx. pp. 132-41.) No testimony, by affidavit or otherwise, was served with or ever offered in support of the motion. (Appx. pp. 132-41, 146, p. 163 ln. 11-15, p. 165 ln. 23-24, p. 168 ln. 4-5.)

A hearing on U.S. Bank's motion was set for Thursday, September 13, 2012. (Appx. pp. 95, 150.) On the evening of September 10, 2012, Burr hired new counsel, the undersigned, who took over representation from Burr's previous attorney and filed

a notice of appearance on the day of the motion hearing. (Appx. p. 153 ln. 4-12, p. 162 ln. 4-6, p. 181.)

U.S. Bank's counsel focused argument at the hearing on its contention that Burr had failed to prosecute her counterclaims by failing to respond to overtures to engage in foreclosure intervention. (Appx. p. 154 ln. 10 – p. 161 ln. 25, p. 167 ln. 9 – p. 168 ln. 3, p. 168 ln. 22 – p. 169 ln. 4.) U.S. Bank's counsel's only argument with regard to Rule 12(c), SCRCP, was that Burr's counterclaims were moot because U.S. Bank offered her a modification. (Appx. p. 159 ln. 1-5, p. 161 ln. 10-16.) U.S. Bank's counsel did not advance an argument at the hearing concerning Rule 12(f), SCRCP. (Appx. pp. 150-70.)

In response to U.S. Bank's argument, Burr's new counsel argued at the hearing that Burr's previous attorney's conduct in failing to "pay the attention to settlement negotiations that maybe ought to have been paid" did not amount to a failure to prosecute. (Appx. p. 162 ln. 6-11, 19-25, p. 163 ln. 1-9.) Burr's new counsel also argued that there was no factual material in the record tending to establish mootness of the counterclaims and that Burr's claim that U.S. Bank promised Burr a modification and then reneged on that promise before the lawsuit was commenced was not moot and would not be subject to a motion for judgment on the pleadings. (Appx. pp. 110-11, p. 165 ln. 21 – p. 166 ln. 7.) Burr's counsel made an oral motion to amend the answer and counterclaim, stating, "I hadn't really been in this case long enough to find out exactly what it is that I want to add, but I know I want it to read differently from the way it reads now." (Appx. p. 166 ln. 8-16.)

The court announced at the hearing that it was "going to grant the motion to strike the counterclaims" and stated that, to make a motion to amend, Burr would need to make a written motion with a proposed amended pleading attached. (Appx. p. 169

ln. 15-25.) Upon inquiry from Burr's counsel, the court noted that its ruling was "[n]ot prejudicial to your right to make a motion [to amend], but that doesn't mean it's going to be amended, and whoever hears that motion can perhaps look at my Order and determine whether or not your proposed amendments fall outside – or fall inside or outside what I've dismissed." (Appx. p. 170 ln. 1-8.)

In an order filed October 1, 2012, the court granted U.S. Bank's motion, ruling that "[b]ased on the arguments presented by counsel, the documents and evidence presented, and Rules 41(b) and Rules 12(c) and 12(f) of the South Carolina Rules of Civil Procedure, Plaintiff's Motion for to Dismiss Defendant Burr's Counterclaims and to Strike Affirmative Defenses is hereby GRANTED." (Appx. pp. 95, 98.) The court found that Burr engaged in a failure to prosecute and that the four factors relevant to whether to grant a dismissal for failure to prosecute in McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006), were met in this case. (Appx. pp. 96-97.) The court also ruled that "Burr's claims are moot because they are based on an alleged scenario of her not being offered a loan modification" since U.S. Bank "offered Burr a modification proposal on January 10, 2012, and no evidence shows that Burr responded to this offer until April." (Appx. pp. 97-98.)

Burr made a timely motion to reconsider in which she noted the arguments her counsel made at the hearing and also pointed out that U.S. Bank "did not advance any arguments concerning [the standards applicable to motions under Rules 12(c) and 12(f)], and the Court's order does not contain any analysis of whether these standards were met[,]" with Burr stating that "Rules 12(c) and 12(f), SCRCP, do not provide an appropriate basis for the Court's decision." (Appx. pp. 143-49.) The court denied this motion, without a hearing, in a one-sentence order filed October 16, 2012. (Appx. p. 99.) Burr appealed to the Court of Appeals.

The Court of Appeals affirmed the dismissal of Burr's counterclaims on the basis that they were moot. (Appx. p. 2.) The court found that a judgment in Burr's favor "would have no practical effect on the controversy" because "Burr had been offered the primary relief that she sought, a negotiated loan modification[.]" (Appx. p. 2.) The Court of Appeals did not mention that Burr sought damages in her counterclaim.

The Court of Appeals also affirmed the circuit court's striking of Burr's defenses, stating that "[a]s the trial court looked beyond the pleadings to the loan modification process, we review the court's dismissal of Burr's affirmative defenses as a grant of summary judgment." (Appx. p. 2.) The opinion does not mention that U.S. Bank presented no affidavits, deposition testimony, or other factual material in support of its motion. (Appx. pp. 2-3.) The Court of Appeals went on, however, to state the factual conclusion that "Burr did not provide the documents requested by U.S. Bank, which made U.S. Bank unable to complete the loan modification offered to Burr." (Appx. p. 2.) The court summed up its impression of how the circuit court reached its decision in this case by stating that Burr's "defenses and counterclaims were reviewed by the trial court, deemed insufficient, and dismissed." (Appx. p. 2.)

Burr petitioned for rehearing, noting in her petition, among other things, that even U.S. Bank had agreed in its brief that its motion was not considered as one for summary judgment and that the first indication Burr had ever had that the motion might be treated as one for summary judgment was when the Court of Appeals issued its opinion. (Appx. pp. 5, 7.) The Court of Appeals requested that U.S. Bank submit a return to the petition, and U.S. Bank did so. (Appx. pp. 19-30.) The Court of Appeals denied the petition for rehearing. (Appx. p. 31.)

ARGUMENT

Burr did not engage in any behavior that could reasonably be construed as a failure to prosecute. She apparently failed to provide U.S. Bank with the documents that it stated it needed to evaluate her for a loan modification, but that was, at most, a failure to engage in settlement negotiations. (Appx. p. 146, p. 162 ln. 6-11.) That is not a failure to prosecute. (Appx. pp. 145-46, p. 162 ln. 10-11, p. 162 ln. 19 – p. 163 ln. 9, p. 164 ln. 15-21.)

What happened here is that Burr's previous attorney failed to do a good job (or much of a job at all) in participating in settlement negotiations with U.S. Bank. (Appx. pp. 126-41, 178-79, p. 154 ln. 25 – p. 160 ln. 5, p. 162 ln. 6-9.) U.S. Bank served and filed a certification of Burr's failure to participate in the foreclosure intervention process, which allowed the foreclosure action to proceed. (Appx. pp. 178-80); see In re: Mortgage Foreclosure Actions, 396 S.C. at 212.

The circuit court simply decided that it was proper to dismiss Burr's counterclaims and strike her defenses because she failed to participate in foreclosure intervention, even though the Administrative Order provides that what is to happen in such circumstances is just for the foreclosure action to proceed. Id. The remedy under the operative administrative order for a mortgagor defendant's failure to participate in foreclosure intervention negotiation is not the dismissal of counterclaims or the striking of defenses. Id.

Because the Court of Appeals could not affirm on the basis that Burr had violated the Administrative Order (because she had not) and could not affirm on the basis that Burr failed to prosecute (because she did not), the Court of Appeals found other grounds on which to affirm the circuit court's ruling. The grounds the Court of Appeals chose for affirmance are just as flawed as those stated by the circuit court –

and they do not even appear from the record. Burr has yet to have a court correctly apply the law to U.S. Bank's motion. She hopes this Court will do so.

I. Since Burr did not do anything that amounted to a failure to prosecute or to comply with an order, the circuit court erred in dismissing her counterclaims and striking her affirmative defenses for an ostensible failure to prosecute or comply with an order.

U.S. Bank's motion and the circuit court's decision were based on conduct that, while regrettable, did not constitute failure to prosecute. (Appx. pp. 145-46, p. 162 ln. 6-11, p. 162 ln. 19 – p. 163 ln. 9, p. 164 ln. 15-21.) Black's Law Dictionary defines "prosecute" as "[t]o commence and carry out a legal action[.]" Black's Law Dictionary 566 (2d pocket ed 2001). The leading recent South Carolina reported case analyzing a dismissal for failure to prosecute, McComas v. Ross, dealt with a situation in which the plaintiff in that case did not show up on time at the courtroom for the trial. 368 S.C. at 60-61. That is the sort of conduct that would trigger an analysis of whether a failure to prosecute has occurred, and then an analysis of whether that failure to prosecute warrants dismissal. Cf. id. at 60-64.

Older South Carolina cases concerning dismissals for failure to prosecute also deal most often with failure of a plaintiff to attend trial. See Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970) (dismissal for failure to prosecute affirmed where plaintiff and counsel did not appear when case called for trial); Bond v. Corbin, 68 S.C. 294, 47 S.E. 374 (1904) (dismissal for failure to prosecute affirmed where plaintiff did not show up for trial at pre-set time and date and still failed to attend after two continuances given so that he could get to trial). One case deals with a dismissal for failure to prosecute where the plaintiff repeatedly failed to meet its procedural requirements of the "Summons (Complaint Not Served)" procedure, which no longer exists. Don Shevey & Spires, Inc. v. American Motors Realty Corp., 279 S.C. 58, 301 S.E.2d 757 (1983).

Other cases deal with dismissals for something that is not strictly failure to prosecute but is a bit different, the failure to comply with court orders. See Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996) (reversal of exclusion of expert witness for failure to comply with order and following grant of summary judgment based on inability to offer expert testimony because of exclusion); Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (affirmation of dismissal for failure to comply with conditions of order); Therens v. Faircloth, 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987) (affirmation of dismissal for failure to comply with conditions of order in prior case).

Here, contrary to what the circuit court ruled, we do not have a failure of Burr to comply with an order. The only order that was at issue in this matter at the time U.S. Bank's motion was heard was this Court's Administrative Order. Burr cannot have failed to comply with that order, because that order did not require her to do anything; rather, that administrative order puts requirements on foreclosure plaintiffs and simply sets out a mechanism for foreclosure defendants, like Burr, to request foreclosure intervention if they want it. In re: Mortgage Foreclosure Actions, 396 S.C. at 211-12. The Administrative Order makes no requirements at all of a mortgagor defendant but simply provides that *if* such a defendant wants to engage the foreclosure plaintiff in foreclosure intervention discussions, the defendant *may* do so by notifying the plaintiff's counsel in the way described in the order. Id. at 211-12. The rest of the process spelled out in the Administrative Order consists of requirements the order makes of the foreclosure plaintiff. Id. at 211-14. A foreclosure defendant may comply with the order by doing nothing at all, since the order does not require a foreclosure defendant to do anything. It provides for what may happen if a foreclosure defendant does not do certain things, but it does not require the defendant to do them. Id. Further, the remedy under that order for a situation in which the mortgagor defendant ignores

foreclosure intervention efforts after requesting foreclosure intervention is for the plaintiff to deny foreclosure intervention on that basis and have its lawyer serve and file a notice of denial of foreclosure intervention so that the case may proceed. Id. at 212.

What happened in this case was not the kind of thing that is a failure to prosecute. (Appx. pp. 145-46, p. 162 ln. 6-11, p. 162 ln. 19 – p. 163 ln. 9, p. 164 ln. 15-21.) U.S. Bank could not point to even one instance of Burr not appearing at a roster meeting or other court event and could point out no instance of Burr failing to participate in discovery. (Appx. pp. 126-41, 146, 153-70.) Everything of which U.S. Bank complained, and everything the circuit court found as a basis for its decision, dealt with Burr's failure to participate in a process of resolving this case by *neither* party prosecuting the claims in this case. (Appx. pp. 95-98, 126-41, p. 154 ln. 10 – p. 161 ln. 25, p. 167 ln. 9 – p. 168 ln. 3, p. 168 ln. 22 – p. 169 ln. 4.) U.S. Bank never complained of Burr having failed to do something to advance the prosecution of her counterclaims, and the circuit court did not find she engaged in such behavior. (Appx. pp. 95-98, 126-41, p. 154 ln. 10 – p. 161 ln. 25, p. 167 ln. 9 – p. 168 ln. 3, p. 168 ln. 22 – p. 169 ln. 4.) The circuit court stated that "Burr 'has been given abundant opportunity to litigate[,]'" quoting Georganne Apparel, but conduct concerning litigation or the opportunity to litigate was not what was the subject of U.S. Bank's motion or the grounds on which the circuit court based its order; rather, the circuit court based its order on failure to engage in settlement negotiations. (Appx. pp. 95-98, 126-41, p. 154 ln. 10 – p. 161 ln. 25, p. 167 ln. 9 – p. 168 ln. 3, p. 168 ln. 22 – p. 169 ln. 4.) The circuit court never should have begun the four-factor analysis under McComas, because that is the analysis of whether *a failure to prosecute* warrants dismissal. 368 S.C. at 63. Under McComas, only when there has been a failure to prosecute does the court then

determine whether dismissal is appropriate based on a four-factor analysis: "(1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused by the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." Id. Since there was no failure to prosecute, that analysis does not fit well here, as the square-peg-round-hole reasoning of the circuit court's order demonstrates. (Appx. pp. 95-98.)

The circuit court simply decided that it was proper to dismiss Burr's counterclaims and strike her defenses not because she failed to prosecute them but, rather, because she failed to participate in foreclosure intervention. (Appx. pp. 95-98.) The Administrative Order provides that what is to happen in such circumstances is just for the foreclosure action to proceed, not for a mortgagor defendant's claims to be dismissed and her defenses stricken. In re: Mortgage Foreclosure Actions, 396 S.C. at 212. U.S. Bank had already served and filed its certification when it made its motion; there was nothing procedurally to delay trial of the case. See id.

The circuit court dismissed Burr's counterclaim and struck her defenses on the basis of something that does not constitute a failure to prosecute. The circuit court's decision was controlled by an error of law: a misconception of what a failure to prosecute is and is not. That is an abuse of discretion and is reversible error. In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

II. This was not a summary judgment motion.

This court's opinion states that "[a]s the trial court looked beyond the pleadings to the loan modification process, we review the court's dismissal of Burr's affirmative defenses as a grant of summary judgment." (Appx. p. 2.). The lower court, however, did not treat the motion as one for summary judgment. U.S. Bank agrees. In U.S.

Bank's brief in this case, it stated that "U.S. Bank's motion was not considered as a motion for summary judgment[.]" (Appx. p. 76.) Burr never raised any issue about summary below or in her briefs, since conversion of U.S. Bank's motion to one for summary judgment was never an issue in this case – it did not happen. U.S. Bank never argued that the motion had been converted to one for summary judgment; hence, Burr never made any argument about that until she petitioned for rehearing, as that was her first opportunity to do so. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address in reply brief additional sustaining ground arguments made by respondent).

Like Rule 12(b)(6), Rule 12(c), SCRCP, provides that:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

This Court has spoken to how materially identical language in Rule 12(b)(6), SCRCP, is to be interpreted. In Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987), this Court ruled that the trial court erred in treating a motion to dismiss as one for summary judgment where "[t]he trial court gave no notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment." Twelve years later, the Court cited Brown in stating the following:

> We have interpreted this language as meaning "the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule

> 56 are incorporated into Rule 12(b)(6)." Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987); see also Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995). In Brown, we found the trial court had not given notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment. Thus, the supporting affidavits in Brown were improperly considered by the trial court in ruling on the 12(b)(6) motion.
>
> . . .
>
> . . . We find that the trial court improperly converted County's 12(b)(6) motions into summary judgment motions. . . .
>
> . . . the trial court did not give notice to the parties prior to the hearing that it was going to consider affidavits and hear the 12(b)(6) motions as motions for summary judgment. The first indication that County's 12(b)(6) motions would be converted to summary judgment motions was the trial court's order of dismissal. Under these facts, the trial court erred in converting County's 12(b)(6) motions into motions for summary judgment.

Baird v. Charleston Cnty., 333 S.C. 519, 527-28, 511 S.E.2d 69 (1999). This Court noted that "[p]roviding notice" – from the context, plainly meant to refer to notice that the motion would be treated as one for summary judgment – "prior to the hearing is essential under Rule 56(c). . . . However, there is no evidence in this case suggesting Doctors had any notice prior to the hearing, in compliance with Rule 56, SCRCP, that the trial court would look beyond the pleadings in considering County's 12(b)(6) motions." Id. at 528 n. 6.

This Court has adhered to this principle through time. The Court has "recognize[d] that a motion to dismiss may be converted into a motion for summary judgment when the court considers matters outside the pleadings[,]" but, "in order for the conversion to take place, the parties must be afforded a reasonable opportunity to introduce evidentiary matters of their own." Charleston Cnty. Sch. Dist. v. Harrell, 393

S.C. 552, 559 n. 4, 713 S.E.2d 604, 608 n. 4 (2011) (internal quotation marks omitted). Here, Burr was given no such notice, no such opportunity. Nothing would have tipped Burr off that the motion might be treated as one for summary judgment, since nothing that can be used to support a motion for summary judgment was served with U.S. Bank's motion; all that was served with it was an unsworn certification of mortgagor noncompliance signed by U.S. Bank's lawyer. In fact, at *no point* did U.S. Bank ever offer any testimony, by affidavit or otherwise, in support of its motion. (Appx. pp. 132-41, 146, p. 163 ln. 11-15, p. 165 ln. 23-24, p. 168 ln. 4-5.) It would have been improper for the circuit court to convert U.S. Bank's motion into one for summary judgment, and it was improper for the Court of Appeals to do so.

In Brown, this Court rebuked the trial court for its improper procedure in implicitly converting the 12(b)(6) motion into one for summary judgment, stating that "[t]he first indication that the respondents' affidavits would be used to support the 12(b)(6) motion was the trial court's order of dismissal." 291 S.C. at 367. In Baird, this Court issued a similar rebuke, as "[t]he first indication that County's 12(b)(6) motions would be converted to summary judgment motions was the trial court's order of dismissal." 333 S.C. at 528. In the instant case, the first indication that U.S. Bank's motion would converted into one for summary judgment was *when the Court of Appeals issued its opinion on appeal.*

It is dubious to say that U.S. Bank's motion was really one for judgment on the pleadings, anyway. While U.S. Bank dropped a citation to Rule 12(c) into its written motion, a look at the text of the motion reveals plainly that U.S. Bank's contention was that Burr's defenses should be stricken and her counterclaims dismissed under Rule 41(b), SCRCP, for failure to prosecute. (Appx. pp. 126-42.) U.S. Bank's argument at the hearing was that Burr had failed to prosecute her counterclaims by failing to

respond to overtures to engage in foreclosure intervention. (Appx. p. 154 ln. 10 – p. 161 ln. 25, p. 167 ln. 9 – p. 168 ln. 3, p. 168 ln. 22 – p. 169 ln. 4.) U.S. Bank's counsel's only argument with regard to Rule 12(c), SCRCP, was that Burr's counterclaims were moot because U.S. Bank offered her a modification. (Appx. p. 159 ln. 1-5, p. 161 ln. 10-16.) That was something U.S. Bank never pled; thus, it is hard to imagine how that could be the subject of a motion for judgment on the pleadings. (Appx. pp. 117-24.) It was also something U.S. Bank never offered any *factual material* to support. (Appx. pp. 132-41, 146, p. 163 ln. 11-15, p. 165 ln. 23-24, p. 168 ln. 4-5.) Burr could not possibly have been on notice that anyone would consider this motion one for summary judgment.

U.S. Bank argued in the Court of Appeals that judgment on the pleadings was proper because the certification of mortgagor non-compliance that U.S. Bank filed either was a pleading or was attached to one. We know that neither the certification nor U.S. Bank's motion to dismiss and strike is a pleading because we have a Rule of Civil Procedure that states the pleadings that are allowed in the courts of common pleas in South Carolina, as follows:

> Pleadings. There shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c).

Rule 7(a), SCRCP.

A certification of the sort U.S. Bank contends is a pleading is not listed in Rule 7(a), SCRCP. In fact, the express declaration that "[n]o other pleadings shall be

allowed" is dispositive on this point. Rule 7(a), SCRCP. Also, a certification of mortgagor noncompliance with the Administrative Order is not *like* what is listed in Rule 7(a). "It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial" of the case. Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778, 785 (S.C. 2013) (quoting S.C. Nat'l. Bank v. Joyner, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986)). The pleadings allowed by Rule 7(a) do that. A certification of mortgagor noncompliance does not inform anyone of issues for trial in the case; rather, it just brings an end to the stay of the action under the Administrative Order and allows the case to proceed to a resolution of the issues that *are* framed by the pleadings. In re: Mortgage Foreclosure Actions, 396 S.C. at 212, 213.

Rule 220(c), SCACR, provides that an appellate court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." It does not, however, permit a court to affirm on a ground that does *not* appear in the record on appeal. Nothing in the record in this case shows a conversion of U.S. Bank's motion to a summary judgment motion. Indeed, the position of *U.S. Bank* – the *Respondent* – is that no conversion to a summary judgment motion occurred. (Appx. p. 76.)

Burr respectfully submits that conversion of U.S. Bank's motion to a summary judgment motion occurred. To affirm on this basis was reversible error by the Court of Appeals.

III. If this had been a summary judgment motion, U.S. Bank could not have prevailed on it.

Even if U.S. Bank's motion had been for summary judgment, it could not have prevailed on the record (or lack thereof) that was before the circuit court. Accordingly,

even if this Court were to believe that U.S. Bank's motion was converted to one for summary judgment, reversal would still be required.

Facts presented to the court for consideration in support of or opposition to a motion for summary judgment must be admissible evidence, with the caveat that affidavits are used in place of what would be live testimony at a trial. See Dawkins v. Fields, 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (2003); Saro v. Ocean Holiday Partnership, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). Rule 56 notes this itself; summary judgment shall be granted "if the *pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any*, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP (emphasis added).

It is only "*when a motion for summary judgment is made and supported as provided in this rule*" that the non-movant is required to meet the motion with factual material that shows there is a genuine issue for trial. Rule 56(e), SCRCP (emphasis added). "The party seeking summary judgment has the burden of clearly establishing *by the record properly before the court* the absence of a triable issue of fact." Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992) (emphasis added). "A party who fails to show the absence of genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials." Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990).

Arguments of counsel are not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App.

1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). Arguments of counsel were all that supported U.S. Bank's motion. (Appx. pp. 126-41, p. 165 ln. 21 – p. 166 ln. 7.) As discussed above, no testimony, by affidavit or otherwise, was served with or ever offered in support of the motion.

In its order, the circuit court made findings of fact solely on the basis of the unsworn contentions of U.S. Bank's counsel, which the circuit court apparently accepted as established, proven truths. (Appx. pp. 95-98.) This was error. Id. A certification of mortgagor noncompliance – an unsworn document – under the Administrative Order is not cognizable evidence at summary judgment of anything it states. See Rule 56(c), SCRCP. This is further supported by the Administrative Order itself, which provides that "[n]o document, statement or evidence of any kind shared, released or exchanged exclusively for purposes of foreclosure intervention pursuant to this order shall be admissible as evidence in any subsequent proceeding." In re: Mortgage Foreclosure Actions, 396 S.C. at 213. A foreclosure plaintiff's lawyer's certification of mortgagor noncompliance is not the kind of document a court may consider on a motion for summary judgment brought by that foreclosure plaintiff. See Rule 56(c), SCRCP; Dawkins, 354 S.C. at 67-68; Trivelas, 348 S.C. at 141; Higgins, 599 S.E.2d at 272; Saro, 314 S.C. at 121; Historic Charleston Foundation, 313 S.C. at 508 n. 7; Gilmore, 290 S.C. at 58.

Rule 12(c)'s provision that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment" does not mean that if *any documents* other than the pleadings are offered to the court, the court should consider them as though they were properly cognizable for summary judgment purposes, regardless of whether they actually are. The rule that the evidence offered at summary judgment

must be what would be admissible at trial still applies. See Dawkins, 354 S.C. at 67-68; Saro, 314 S.C. at 121. U.S. Bank did not offer any such evidence here. Burr pointed out to the circuit court that U.S. Bank had presented no affidavit or other cognizable factual material to the court. (Appx. p. 163 ln. 11-15.)

Burr respectfully submits that the Court of Appeals committed reversible error. Summary judgment would not have been proper on this record.

IV. U.S. Bank neither pled nor proved mootness.

A case is nonjusticiable for mootness where, if the party prevails, it has become impossible for the court to grant him any "effectual relief" that would have "practical legal effect upon the existing controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (internal quotation marks omitted). "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." U.S. v. (Under Seal), 819 F.2d 1139 (4th Cir. 1987) (internal quotation marks omitted) (quoting Leonard v. Hammond, 804 F.2d 838, 842 (4th Cir. 1986)). Usually, a determination of mootness is necessarily a factual determination. Cf. id. U.S. Bank did not show that Burr's counterclaims are moot.

U.S. Bank never established that the court could afford Burr no practical relief as to the controversy subject of her counterclaims and defenses. U.S. Bank never put the documents showing the terms of the modification it proposed to Burr (or claimed it proposed to her) in the record. Nothing before the court showed that any modification U.S. Bank offered complied with applicable HAMP directives or other standards, nor was there anything before the court tending to show whether the terms of the proposed modification were the same as, better than, or worse for Burr than what she was promised. (Appx. p. 147.) For example, U.S. Bank never put anything into the record showing whether its proposed modification contemplated an increase in the amount of

principal to recast fees and costs related to the foreclosure action as part of the loan's modified principal. Burr pled that U.S. Bank had promised her a modification and then reneged on that promise. (Appx. pp. 110-11.) Burr did not solely seek a modification as the relief to be granted on her claims; she also sought an award of damages. (Appx. pp. 112, 113-14, 115, 147.)

U.S. Bank made no factual showing about whether a modification was offered to Burr, what its terms were, whether those terms were better or worse than what U.S. Bank had promised her before, or anything about it at all. Nonetheless, the circuit court found that this had happened and that it made Burr's claims moot. (Appx. pp. 97-98.) Even if, however, there were a sufficient showing in the record that U.S. Bank had offered Burr a modification, that would not be tantamount to a showing that something has happened to make it so that Burr has sustained no damages as a result of U.S. Bank breaking its promise to modify her loan, and *that* is what U.S. Bank would have had to prove in order for Burr's claims seeking damages to be moot. See Curtis, 345 S.C. at 567. That did not happen.

The Court of Appeals opinion on this point is directly at odds with the law. The court writes that Burr's counterclaims and defenses were moot because "Burr had been offered the primary relief which she sought, a negotiated loan modification," but mootness does not depend on whether a court can afford a party the *primary* relief she seeks. (Appx. p. 2.) Mootness depends on whether the occurrence of some event has made it *impossible* for a court to afford the party *any* effectual relief. Curtis, 345 S.C. at 567.

Respectfully, Burr submits that the circuit court's ruling and the Court of Appeals' conclusion that Burr's counterclaims are moot are reversible error, both

because they are based on unsupported factual conclusions and because they are controlled by an error of law concerning what mootness is.

V. Neither the Court of Appeals' nor the circuit court's analysis hews to any rule that permits the dismissal of any claim or the striking of any defense.

The Court of Appeals' opinion states that Burr's "defenses and counterclaims were reviewed by the trial court, deemed insufficient, and dismissed." (Appx. p. 2.) *Exactly.* That is exactly the point of this appeal. That is exactly the problem with the circuit court's order. A court is not permitted to simply "review" a party's defenses or claims, according to no rule or precedent's analytical framework, and then dismiss them. Such is quietly among the worst of what the judiciary has ever done, because to do so is to abandon the principle of the rule of law. What should govern in our courts ought to be our rules of court, not arbitrary, *ad hoc* decisionmaking. See Rule 1, SCRCP ("[t]hese rules govern the procedure in all South Carolina courts in all suits of a civil nature"). The "review" conducted by the circuit court was not according to any rule or recognized process. "The law recognizes two kinds of errors: trial errors and structural defects. The former are subject to 'harmless error' analysis while the latter are not. . . . [S]tructural defects in the constitution of the trial mechanism defy analysis by harmless error standards." LaSalle Bank Nat'l. Ass'n. v. Davidson, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009) (internal quotation marks omitted). Structural defects are errors in the very way that the process of deciding the issue is set up. Id. When a proceeding is structurally defective, nothing but reversal can cure such a defect. See id.

Burr respectfully submits that the Court of Appeals committed reversible error in affirming the circuit court. Neither the circuit court's analysis in reaching its

decision nor the Court of Appeals' analysis in affirming that decision square with any rule that permits the dismissal of any claim or the striking of any defense.

VI. Unwarranted prejudice to Burr lurks in letting this decision stand.

As it stands, Burr's claim for damages, along with all her other counterclaims, is ended, over. (Appx. pp. 1-3, 95-98.) If she moves to amend to better assert her counterclaims, U.S. Bank will surely argue the amendment is futile if what is sought to be asserted in the amendment falls within the scope of anything Burr asserted to date, contending, perhaps successfully, that any such claims or defenses are barred by the circuit court's ruling. Jennings v. Jennings 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) (where proposed amendment would be futile, there is no reason to grant it). Considering the deeply flawed and most unfair process that led to the circuit court's ruling and the Court of Appeals' decision to affirm, that is most unfair.

VII. Certiorari is warranted. This is a case of first impression about the Administrative Order, and this opinion represents a departure from precedent of this Court.

Rule 242(b), SCACR, states that among the things this Court usually considers in deciding whether to grant a writ of certiorari is whether a case presents a novel question of law and whether "the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." Rule 242(b)(1) & (3), SCACR. Here, this case presents both of these qualities.

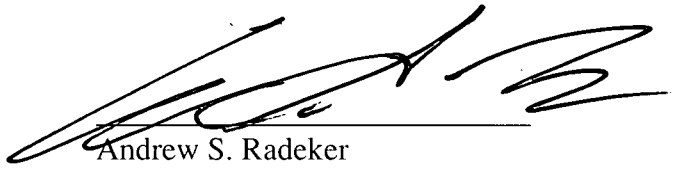
As discussed above, this decision is inconsistent with other decisions of this Court regarding conversion of motions directed at pleadings into motions for summary judgment.

Also, whether a court is permitted to dismiss or strike a foreclosure defendant's claims and defenses for failure to participate in the foreclosure intervention process – as a judgment on the pleadings, dismissal for failure to prosecute, or anything else – is

a question of first impression in this state, as well as being utterly at odds with this Court's Administrative Order. The Administrative Order provides that what is to happen in such circumstances is just for the foreclosure action to proceed, not for a mortgagor defendant's claims to be dismissed and her defenses stricken. In re: Mortgage Foreclosure Actions, 396 S.C. at 212. The undersigned submits, and certainly hopes, that the Administrative Order was not issued to provide a basis to visit a draconian punishment on a foreclosure defendant who, for whatever reason, does not participate in foreclosure intervention.

WHEREFORE, the Petitioner prays for an Order granting a writ of certiorari to review the final decision of the Court of Appeals in this case.

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner

July 20, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,.....Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is the.....Petitioner.

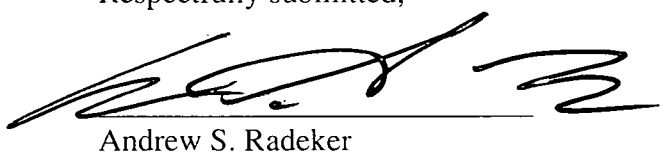
PROOF OF SERVICE

I certify that I served the foregoing petition for writ of certiorari and memorandum in support, as well as a copy of the appendix, by depositing a copy of each of them on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Sean A. O'Connor, Esq.
Finkel Law Firm, LLC
P.O. Box 41489
Charleston, SC 29423

July 20, 2015

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner