THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

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SC Court of Appeals

Appellate Case No. 2015-000799
Circuit Court Case No. 2010-CP-10-10122

US Bank National Association, as Trustee for the holders of Bear Stearns ARM Trust, Mortgage Pass-Through Certificates, Series 2005-4, ... Respondent,

v.

Anne B. Glassburn; Donivon D. Glassburn; The Bank of New York Mellons f/k/a The Bank of New York Indenture Trustee on behalf of the Note Holders, CWHEQ Revolving Home Equity Loan Trust Series 2007-A Trust; Tidelands Bank; Atlantic Bank and Trust, ... Defendants

of whom

Anne B. Glassburn and Donivon D. Glassburn are .... Appellants.

INITIAL BRIEF OF RESPONDENT

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

S. Sterling Laney, III
550 South Main Street, Suite 400
Greenville, South Carolina 29601
(864) 255-5400

M. Todd Carroll
1727 Hampton Street
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Respondent

September 15, 2015

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ISSUES PRESENTED

Preservation of Defenses for Review: The Glassburns did not plead any affirmative defenses to this foreclosure action, nor did they appeal the trial court's denial of their motion to amend their answer to include defenses. Did the Glassburns adequately preserve any of their defenses for this Court's review?

Preservation of Other Arguments for Review: The Glassburns did not object to questions of the bank's witness regarding failed loan-modification efforts, and they did not introduce any affirmative evidence regarding those efforts. Nor did they present any evidence or receive any ruling below regarding the bank's compliance with an out-of-jurisdiction consent judgment. Did the Glassburns adequately preserve any of these arguments for this Court's review?

Fact Issues: Did the trial court misconstrue the evidence in this case where there is no dispute that Mrs. Glassburn defaulted on her loan agreement, Mrs. Glassburn herself never testified or presented any evidence, and Mr. Glassburn testified at length about the family's financial struggles that led to the default?

Amendment of Pleadings: The trial court declined to permit the Glassburns to amend their answer to assert two futile counterclaims almost three years after the case had been commenced. Did the trial court abuse its discretion in denying the motion?

STATEMENT OF THE CASE

This case asks whether a borrower who admittedly defaulted on her note can avoid foreclosure by claiming that her lender should have modified the loan, and whether the trial court abused its discretion when it declined to add futile counterclaims after the case had been pending for three years. The circuit court rightly rejected these positions, and this Court should affirm this common sense result.

The note at issue in this case is an adjustable-rate loan in the principal amount of $665,000, which was executed on March 4, 2005, between Anne Glassburn and Wells Fargo Bank, N.A. (Adjustable Rate Note; R. pp. ___–___.) The loan was secured by a mortgage on Mrs. Glassburn's residence which was executed by both Mrs. Glassburn and her husband, Donivon Glassburn. (Mortgage; R. pp. ___–___.) Wells Fargo remained the note's servicer but subsequently assigned the mortgage to the Respondent. (Corporate Assignment of Mortgage; R. p. ___.)

In 2009, Mrs. Glassburn sought to modify her loan to reduce the monthly payments. (Hr'g Tr. 41:3–:11 (Dec. 2, 2014); R. pp. ___–___.) While Mrs. Glassburn's loan was being considered for a modification, however, she failed to provide Wells Fargo with the requisite paperwork to evaluate a potential modification. (*Id.* 27:13–28:7; R. pp. ___–___.) As a result, Wells Fargo declined to modify the parties' loan agreement, and Mrs. Glassburn defaulted on her note. (Default Notice (Jan. 3, 2010); R. p. ___.)

Respondent filed a complaint seeking foreclosure of the mortgage on December 10, 2010. (Compl.; R. p. ___.) On January 14, 2011, both Mr. and Mrs. Glassburn answered the complaint. In their responsive pleading, the Glassburns did not assert any

affirmative defenses beyond a general citation to Rule 12(b)(6), nor did they assert any counterclaims. (Answer of Glassburn Defendants; R. pp. ___–___.)

By order dated January 31, 2011, the case was referred to the Master in Equity for Charleston County, Mikell R. Scarborough for adjudication on the merits. (Order of Reference; R. p. ___.) In June 2011, the case was stayed pending foreclosure intervention opportunities pursuant to South Carolina Supreme Court Administrative Order 2011-05-02-01. (Notice of Foreclosure Intervention; R. p. ___.)

Nearly two years later, counsel for the Respondent certified that the parties had gone through the foreclosure intervention process, but that Mrs. Glassburn did not "qualify for any foreclosure intervention options as contemplated by" the Administrative Order. (Attorney Certification (May 2, 2013); R. p. ___.) Mrs. Glassburn appealed the denial of foreclosure intervention, which the bank also denied. (Motion to Lift Stay (Sept. 30, 2013); R. pp. ___–___.)

On November 8, 2013—one month short of the case's three-year anniversary—the Glassburns moved to amend their responsive pleading. Through that motion, the Glassburns attempted to add fifteen new affirmative defenses and two counterclaims, all apparently arising out of the failed pre-litigation effort to modify the loan agreement between the bank and Mrs. Glassburn. (Motion to Amend; R. pp. ___–___.)

On June 2, 2014, the trial court conducted a hearing on the bank's motion to lift the stay and on the Glassburns' motion to amend their responsive pleading. During that hearing, Judge Scarborough exhaustively reviewed the bank's records and process for considering Mrs. Glassburn's loan for a potential modification. After considering all evidence and arguments, he concluded that the bank had done a "reasonable effort and

good faith effort to qualify the Glassburns for both the HAMP and the in-house modification." (Hr'g Tr. 19:7–:9 (June 2, 2014); R. p. ___.) Accordingly, Judge Scarborough lifted the automatic stay that had been in place for foreclosure intervention and authorized the case to proceed to a final hearing. (*Id.* 19:9–:11; R. p. ___.) Finally, because the Glassburns' proposed amendments were futile, the Court denied the motion to amend their pleading. (*Id.* 19:21–:23; R. p. ___.)

On December 2, 2014, the bank and Mr. Glassburn appeared before Judge Scarborough for trial. Mrs. Glassburn, the only signatory to the note and the actual defaulting party, did not attend the trial. (Hr'g Tr. 30:2–:7 (Dec. 2, 2014); R. p. ___.)

At trial, a representative of the bank testified that Mrs. Glassburn had defaulted on her note. (*Id.* 16:2–:5; R. p. ___.) Without objection, the bank presented evidence that the loan had been in default since December 2009 and that, by virtue of accrued interest, late charges, escrow advances, and a variety of other charges, Mrs. Glassburn owed in excess of $875,000 on the note. (*Id.* 18:1–19:3; R. pp. ___–___.)

Neither Mr. nor Mrs. Glassburn ever questioned the bank's representative regarding any potential modification efforts. They did not cross-examine her regarding any reasons why the bank denied Mrs. Glassburn's efforts to modify the loan agreement in 2009. They did not cross-examine the bank's witness regarding why the bank denied Mrs. Glassburn's renewed modification efforts during litigation. Nor did Mrs. Glassburn ever provide any testimony or evidence as to why she defaulted on her note.

After considering all evidence and testimony, Judge Scarborough held that Mrs. Glassburn was in default, and that the bank had complied with its obligations to consider modifying the loan agreement. (Judgment of Foreclosure and Sale; R. pp. ___–___.) He

further held that the bank's mortgage lien was superior to several other liens on the Glassburns' property, including:

- A $500,000.00 mortgage held by The Bank of New York Mellon;
- A $2,375,000.00 mortgage held by Tidelands Bank;
- A $350,000.00 judgment held by Tidelands Bank; and
- A $405,367.00 judgment held by Atlantic Bank and Trust.

(*Id.* ¶ 24; R. pp. ___–___.)

The Glassburns moved for a new trial on January 30, 2015. After a hearing, the trial court denied that motion by order dated March 13, 2015. (Form 4 (Mar. 13, 2015); R. p. ___.) This appeal followed.

STANDARD OF REVIEW

Motion to Amend: A decision to deny a motion to amend pleadings is committed to the circuit court's "sound discretion." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013).

Factual Determinations: When an equitable action has been tried by a judge, this Court may find the facts according to its own view of the evidence. However, this scope of review does not require that the Court disregard the trial court's findings, as that judge is "in a better position" to weigh credibility and assess the testimony. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). Additionally, the appellant bears the burden of demonstrating an error in the trial court's factual findings. *Dorchester County DSS v. Miller*, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996).[1]

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[1] Despite this standard of review, the Glassburns failed to include a single citation to anything in the Record in their opening brief as required by Rule 208(b)(4), SCACR.

ARGUMENTS AND AUTHORITIES

Mrs. Glassburn took out a loan on which she defaulted. She did not present any evidence to rebut this unavoidable conclusion, nor did she present any legitimate evidence to explain her default. She did not assert any affirmative defenses in her answer, nor did she even appear for the trial of this matter. Against this backdrop, the Court should readily affirm the circuit court's rulings.

I. The Glassburns failed to preserve for review any of the defenses on which they base their appellate arguments.

A fundamental defect in the Glassburns' appeal is their failure to preserve for appellate review virtually every issue presented in their opening brief. As explained below, they repeatedly failed to plead defenses, object to evidence, or argue issues at the trial level. As such, their appeal fails for want of preserving their defenses for review.

A. The Glassburns did not plead any affirmative defenses.

The Glassburns' chief arguments on appeal are that the circuit court improperly rejected their "prevention of performance" and "unclean hands" affirmative defenses to the bank's foreclosure claim. (Br. of Appellants at 12–16.) The Glassburns, however, did not assert these or any other affirmative defenses in their answer to the complaint. (Answer of Glassburn Defendants *passim*; R. pp. ___–___.)

By not asserting any affirmative defenses as required by Rule 8(c), SCRCP, the Glassburns waived the defenses and arguments on which they base their appeal. *See, e.g.*, *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002) ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it."); *Allendale County Bank v. Cadle*, 348 S.C. 367, 377, 559 S.E.2d 342, 347–48 (Ct. App. 2001) ("We find the

issue is not preserved for our review. Initially, we note Appellants failed to plead the doctrine of 'unclean hands' as an affirmative defense in their answers.").

On appeal, the Glassburns have not challenged the circuit court's rejection of their attempt to add new affirmative defenses.[2] Accordingly, their failure to appeal that aspect of the circuit court's ruling constitutes an abandonment of those defenses and their arguments on appeal and renders that outcome the law of the case. *See Resolution Trust Corp. v. Eagle Lake & Golf Condos.*, 310 S.C. 473, 475, 427 S.E.2d 646, 647–48 (1993) (holding that the appellant had waived affirmative defenses because it had not pled those defenses and it failed to appeal the trial court's refusal to consider those defenses); *see also First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertions. Thus, he is deemed to have abandoned this issue."). As a result, the Court should reject the Glassburns' arguments regarding their unpled, unpreserved affirmative defenses.

B. The Glassburns waived their arguments regarding Wells Fargo's denial of their pre-litigation modification efforts because they did not object to any of the bank's evidence on this issue, nor did they present any of their own evidence.

The Glassburns also challenge on appeal what they characterize as Judge Scarborough's "refus[al] to hear an appeal" of Mrs. Glassburn's unsuccessful pre-litigation modification efforts. (Br. of Appellants at 17–19.) In essence, the Glassburns claim that Judge Scarborough somehow prevented them from proving their allegation that the bank improperly reviewed Mrs. Glassburn's loan agreement for a potential pre-litigation modification. This argument, too, is not preserved for appellate review.

[2] Despite not challenging the denial of their motion to add new defenses, the Glassburns have appealed the denial of their attempt to add futile counterclaims almost three years after the case was filed. That issue is addressed below in Section III.

At trial in this matter, a representative of Wells Fargo was present to testify. Far from "refusing to hear" testimony on this issue, Judge Scarborough himself examined the bank's representative regarding its denial of Mrs. Glassburn's loan modification in 2010:

> Q: But when they were considered for final loan modification review that was denied on the basis of lack of documentation; is that what I'm hearing you say?
>
> A: That's correct, yes.
>
> Q: And when was that decision made?
>
> A: I would need to see the notes. I don't know the exact date off the top of my head. I think it was—
>
> Q: Sometime in the 2010 timeline?
>
> A: I believe it was June of 2010 that the actual denial was taking place, but I don't know for sure.

(Hr'g Tr. 27:19–28:7 (Dec. 2, 2014); R. pp. ___–___.)

The Glassburns did not object to any of this testimony. And when Judge Scarborough invited the Glassburns to examine the witness on this issue, their counsel declined:

> The Court: Okay. Any follow up to my questions, Mr. Gwynne or Mr. Haller?
>
> Mr. Gwynne: No, Your Honor.
>
> Mr. Haller: No, sir.

(*Id.* 28:8–:11; R. p. ___.)

In order for this issue to have been preserved for appellate review, the Glassburns were required to either object to the testimony or to examine the witness themselves on the issue. *See, e.g.*, *State v. Patterson*, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997) ("The trial judge asked the juror about expert testimony and appellant did not raise any further

objection. Thus, this ground is not preserved."); *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A contemporaneous objection is required to preserve issues for direct appellate review."). Because they did neither, this issue is not properly before the Court.

C. The trial court never addressed any arguments regarding Wells Fargo's compliance with the "National Mortgage Settlement."

Finally, the Glassburns argue that the trial court erred when it did not enforce in this matter the terms of a consent judgment entered in a case pending in the United States District Court for the District of Columbia. (Br. of Appellants at 21–24.)[3] The Glassburns failed to preserve this issue for appellate review because Judge Scarborough never made any ruling on this argument, as it was mentioned only in passing at a preliminary hearing.

The first and only time the Glassburns discussed that consent judgment—which they dubbed the "National Mortgage Settlement"—was in a brief filed the day that Judge Scarborough heard the bank's motion to lift the automatic stay over the foreclosure proceedings. (Defs.' Mem. (June 2, 2014); R. p. ___.) Indeed, the bank's trial counsel expressed his surprise at the Glassburns' attempt to ambush the bank with this new issue during that hearing: "And the National Mortgage Service Settlement, the first time I heard about it was when I looked at the brief this morning. I didn't know that was an issue today." (Hr'g Tr. 15:13–:15 (June 2, 2014); R. p. ___.)

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[3] The Glassburns reference this consent judgment throughout their opening brief, including on Page 8 in the text and in Footnote 2; on Page 13 in Footnote 4; on Page 21 in the text and Footnote 8; on Page 22 in the text; and on Page 23 in the text. However, it was never presented to the circuit court, and therefore cannot be considered on appeal. *See* Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."). Accordingly, the Court should strike all of these references and arguments from the Glassburns' opening brief.

In lifting the automatic stay, the trial court did not address the Glassburns' surprise argument regarding the "National Mortgage Settlement" in either the Form 4 order or subsequent formal order. (Form 4 Order (June 2, 2014); R. p. ___; Order (June 24, 2014); R. p. ___.) Nor was there any further mention of the bank's compliance with the "National Mortgage Settlement" in the proceedings below: not at trial, not in Judge Scarborough's final order, and not at any other hearing.[4]

Without any actual ruling from Judge Scarborough or other trial-level measures taken by the Glassburns regarding Wells Fargo's alleged noncompliance with the "National Mortgage Settlement," this appellate argument is also unpreserved for review. *See, e.g.*, *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); *Allendale County Bank*, 348 S.C. at 375, 559 S.E.2d at 346 ("An issue not raised to or ruled on by the trial court is not preserved for appellate review."). The Court should reject it accordingly.

II. Even if the Glassburns have preserved their issues for appellate review, their arguments fail on the merits.

In the event the Court finds that the Glassburns have adequately preserved their defenses for appellate review, those arguments still fail on their merits.

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[4] The absence of any further discussion of this issue at the trial level is not surprising, as the Glassburns do not have standing to make any arguments based on the "National Mortgage Settlement." *See, e.g.*, *Rehbein v. CitiMortgage, Inc.*, 937 F. Supp. 2d 753, 760–62 (E.D. Va. 2013) (dismissing a claim that a bank had reviewed a loan modification proposal inconsistently with the terms of the "National Mortgage Settlement" because borrowers have "no enforcement rights under the National Mortgage Settlement") (all capital letters omitted). Accordingly, if the Court finds that this issue is preserved for review, it should summarily reject the Glassburns' arguments on this point.

A. There is no dispute that Mrs. Glassburn defaulted on her note, and there is no legitimate defense to her default.

The bank's claim in this case is to enforce a note entered between it and Mrs. Glassburn in the principal sum of $665,000 and foreclose the mortgage Mrs. Glassburn and her husband executed in favor of the bank in order to secure their payment obligations on the note. (Compl. ¶ 7; R. p. ___; Adjustable Rate Note; R. pp. ___–___; Mortgage; R. pp. ___–___.) At the foreclosure trial, the bank entered unconverted evidence that Mrs. Glassburn defaulted on that note:

> Q: Did the borrower eventually fail to make her payments and go into default of the terms of the note and mortgage?
>
> A: Yes, she did.
>
> * * *
>
> Q: And according to the payment history, did the borrower fail to make her payment that was due on December 1st, 2009?
>
> A: Yes.

(Hr'g Tr. 16:2–:5, 16:22–:25 (Dec. 2, 2014) (testimony of bank representative); R. p. ___.) Accordingly, there is no dispute that Mrs. Glassburn is in default.

In response to this straightforward factual sequence, the Glassburns argue to this Court that the bank "prevented" performance of the loan agreement by "instruct[ing] the Glassburns they had to stop making payments to be considered for a modification" and to spend their money "on other things." (Br. of Appellants at 12–14.) The Glassburns further argue that those "instructions" give rise to an "unclean hands" defense. (*Id.* at 15–16.) The Court should reject these unpreserved arguments for a variety of reasons.

As a threshold matter, despite having the burden of proof on these issues, the Glassburns do not cite anything in the Record to support their fact-based arguments. *See U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 375, 684 S.E.2d 199, 205 (Ct. App.

2009) (holding that once a default has been proven, the burden of "establishing a defense to foreclosure" shifts to the borrower). The Court should not have to blindly hunt through the Record for data supporting an appellate argument when the Glassburns themselves failed to cite anything to support their position.

Moreover, when viewing the Record as a whole, the Glassburns' story is not credible. In order for the Court to view the facts as the Glassburns argue them, the Court would have to first assume that a rational lender would ever suggest that a borrower should stop paying back a loan and, unbelievably, that the borrower should spend his or her money "on other things." This Court has previously rejected allegations that assume banks take measures that are plainly contrary to their own self-interest. *See, e.g.*, *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 351, 565 S.E.2d 309, 315 (Ct. App. 2002) ("Additionally, we can think of no logical reason why Bank would make it a practice to intentionally make loans for an amount in excess of the collateral's value and risk substantial losses in the event of default."). Unsurprisingly, when cross-examined by the Glassburns' counsel, a bank representative unambiguously testified that the bank does not tell its customers not to repay their loans. (Hr'g Tr. 24:6–:19 (Dec. 2, 2014); R. p. ___.)

Second, the testimony regarding the alleged "instructions" indicates that they were: (a) only oral, not in writing; (b) allegedly made by unknown, unidentified bank personnel; and (c) allegedly made to only Mr. Glassburn, who was not even a party to the loan agreement. (*Id.* 41:21–42:18; R. pp. ___–___.) As a matter of law, though, only the actual parties to an agreement can change a contract's terms. *See, e.g.*, *U.S. Bank Trust Nat'l Ass'n*, 385 S.C. at 375, 684 S.E.2d at 204 ("Any modification of a written contract

must satisfy all fundamental elements of a valid contract in order for it to be enforceable, including a ***meeting of the minds between the parties*** with regard to all essential terms of the agreement.") (emphasis added).

Third, a more plausible, rational explanation exists for why Mrs. Glassburn defaulted on the note: she could not afford the payments. Mr. Glassburn testified at trial that his "business was failing" (Hr'g Tr. 31:9 (Dec. 2, 2014); R. p. ___); that things were "very, very tough financially" for the Glassburns (*id.* 35:8–:9; R. p. ___); and that they "had some huge financial difficulties and it was going to be very, very tough for us to make those payments" (*id.* 41:5–:7; R. p. ___).[5] In addition to these circumstances, the Glassburns had a series of additional debts and liens on this same property, including:

- A $500,000.00 mortgage held by The Bank of New York Mellon;
- A $2,375,000.00 mortgage held by Tidelands Bank;
- A $350,000.00 judgment held by Tidelands Bank; and
- A $405,367.00 judgment held by Atlantic Bank and Trust.

(Judgment of Foreclosure and Sale ¶ 24; R. pp. ___–___.) In short, a mountain of unaffordable debt—not alleged oral instructions from unknown bank personnel that the Glassburns should not pay back the loan—caused this default.

In light of these factual circumstances, it is straightforward that the Glassburns' unpreserved defenses fail on their merits. Regarding the "prevention of performance" argument, courts are clear that this defense is only available in the rare circumstance where "performance is rendered impossible." *Moon v. Jordan*, 301 S.C. 161, 164, 390

[5] Mr. Glassburn testified that at the times relevant to this litigation, he has worked "in the car business" and "in the Bingo business." (Hr'g Tr. 50:3–:6 (Dec. 2, 2014); R. p. ___.)

S.E.2d 488, 490 (Ct. App. 1990). As this Court has explained: "Subjective impossibility, possibility which is personal to the promisor and does not inhere in the nature of the act to be performed, does not excuse nonperformance of a contractual obligation." *Id.*

Even if the Court credits Mr. Glassburn's story about being advised by unknown personnel not to repay the loan, such irrational advice would not render performance "impossible." Indeed, there is nothing in the Record to suggest that it was "impossible" for Mrs. Glassburn to pay her note other than her family's financial difficulties. As a matter of law, though, financial hardship does not excuse performance or trigger an "impossibility" defense. *See id.* ("Accordingly, the fact that one is unable to perform a contract because of his inability to obtain money, whether due to his poverty, a financial panic, or failure of a third party on whom he relies for furnishing the money, will not ordinarily excuse nonperformance in the absence of a contract provision in that regard."). As such, the Glassburns' "prevention of performance" defense fails on its merits.

The same is true for their "unclean hands" defense. This equitable doctrine prevents a party from recovering if it acted unfairly to the prejudice of the defendant. *Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984). Here, Mr. Glassburn claims that the family stopped repaying the loan because an unknown person at the bank orally advised him to spend the family's money "on other things"; the bank's representative, on the other hand, denied that the bank gave such irrational advice. What is not in dispute, though, is that Mrs. Glassburn owed the money, but the family "had some huge financial difficulties and it was going to be very, very tough for us to make those payments." (Hr'g Tr. 41:5–:7 (Dec. 2, 2014); R. p. ___.)

Accordingly, even if the Court somehow believes Mr. Glassburn's testimony on this issue, there is no possible prejudice to the Glassburns, as they already owed a debt—several, in fact—that they could not repay. Their argument regarding "unclean hands," therefore, fails on its merits. *See Wilson*, 281 S.C. at 267, 315 S.E.2d at 134 ("Since prejudice to the defendant is a necessary element of the 'unclean hands' defense, the doctrine cannot bar relief on the facts before us.").

B. There is no evidence that the bank improperly processed Mrs. Glassburn's requests to modify her loan.

In addition to these misguided, unpreserved defenses, the Glassburns also argue that the trial court erred regarding its rulings concerning the bank's procedures for reviewing Mrs. Glassburn's loan for a potential modification. Though they have dedicated three sections of their brief to this general argument—Sections III, IV, and V of their opening brief—there is simply nothing in the Record to support their position.

Each of the Glassburns' appellate arguments on the issue of modification is addressed below in turn. Importantly, though, as a matter of law, the Glassburns do not have a private right of action for any alleged error arising out of a bank's review of a potential loan modification. This is so whether the modification is considered pursuant to the Home Affordable Mortgage Program or under Chief Justice Toal's Administrative Order regarding foreclosure matters. *See, e.g.*, *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 780 n.5 (4th Cir. 2013) ("Appellants' mere disagreement with how Wells Fargo conducted the [loan-modification] application process does not give them enforceable rights."); *Carrington v. Mnuchin*, Case No. 5:13-03422-JMC, 2014 U.S. Dist. LEXIS 119430, at *28–29 (D.S.C. Aug. 27, 2014) (collecting cases in support of the proposition that HAMP does not create any private right of action); *Weber v. Bank of Am. NA*, Case

No. 0:13-cv-01999-JFA, 2013 U.S. Dist. LEXIS 128863, at *8–13 & n.5 (D.S.C. Sept. 10, 2013) (dismissing claims based on allegations that a bank did not adhere to HAMP guidelines or to the Administrative Order when reviewing a potential loan modification).

Accordingly, even if the facts are as the Glassburns allege in their appellate brief, they would still not be entitled to any of the relief they seek as a matter of law. In addition to this threshold legal defect, there is no evidence in the Record to support the Glassburns' arguments regarding the propriety of their modification review.

Section III (Pre-Litigation Loan Modification Review): In Section III of their brief, the Glassburns argue that prior to foreclosure, the bank improperly denied Mrs. Glassburn a loan modification, and that the trial court erred by "refus[ing] to hear" arguments on that point. (Br. of Appellants at 17–19.) But this is not so.

At trial, Judge Scarborough himself asked the bank's representative why Mrs. Glassburn's initial modification effort was denied: her failure to provide required documentation to the bank. (Hr'g Tr. 27:19–28:11 (Dec. 2, 2014); R. pp. ___–___.) The Glassburns did not cross-examine the witness on this point, nor did they introduce any evidence of their own to controvert this testimony. In short, there are no facts in the Record to support the Glassburns' argument on this issue.

Section IV (Business Judgment Rule): In Section IV, the Glassburns argue that Judge Scarborough improperly "applied the 'business judgment rule' to his judicial review" of Mrs. Glassburn's in-litigation attempt to modify her loan. (Br. of Appellants at 19–21.) In their view, the court should not defer to the "business judgments" of lenders when reviewing their loan-modification decisions. But this argument is disingenuous at best, because as set forth below, Judge Scarborough specifically told the Glassburns that

he was ***not*** relying on the "business judgment rule" when analyzing the propriety of the bank's denial of Mrs. Glassburn's modification request.

Prior to the start of trial, the Glassburns disputed whether Judge Scarborough had properly applied the business judgment rule earlier in the case. After reviewing his own order, Judge Scarborough directly stated that he "didn't apply the business judgment rule" here. (Hr'g Tr. 9:23–:24 (Dec. 2, 2014); R. p. ___.) He continued:

> The courts aren't in the business of making those business judgments. The Court's in the business of making sure that the [loan modification review] process is followed, and if the process is followed then due process is considered to be done.
>
> * * *
>
> I'm not saying that I've applied the business judgment rule, but I'm saying that at least my interpretation of the Chief Justice's 2011 order is that the Court is to mandate that this procedure be put into place and to be followed, but that does not then allow the Court to substitute its judgment for that decision [yielded by the review process].

(*Id.* 10:20–:24, 11:3–:9; R. pp. ___–___.)

In short, the trial court held that once a lender has its loan-modification review procedures in place, it is not the court's place to step in and dictate an outcome different than those processes yield. This position, of course, is consistent with the law. Therefore, the Court should reject the Glassburns' improper twisting of Judge Scarborough's actual ruling on this point in order to manufacture an appellate issue.

Section V (In-Litigation Loan Modification Review): Finally, in Section V, the Glassburns argue that the bank did not disclose certain information required by the "National Mortgage Settlement" that would have allowed Mrs. Glassburn to qualify for a loan modification under HAMP. (Br. of Appellants at 21–24.) In their view, the alleged failure to disclose that information constituted "bad faith" conduct by the bank.

In their brief, though, the Glassburns do not cite any facts contained in the Record to support this position. They did not provide any testimony at trial regarding Mrs. Glassburn's in-litigation modification attempt, nor did they cross-examine the bank's representative on this issue. The only evidence in the Record on this point is a July 5, 2013 letter from Wells Fargo stating that the bank had reviewed and declined the modification request. (Letter to Anne B. Glassburn (July 5, 2013) (copy attached as Exhibit A to Plaintiff's Motion to Life Stay); R. pp. ___–___.)

Anything else in the Record that even touches on this point is merely argument of the Glassburns' counsel, which is not evidence and cannot serve as the basis of an appeal of a fact-based question. *See Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are also not evidence."). Because there is no evidence in the Record to support the Glassburns' argument on this issue, the Court should reject their position regarding Mrs. Glassburn's failed attempt to modify the parties' loan agreement during litigation.

III. The trial court did not abuse its discretion in denying the Glassburns an opportunity to assert facially-defective counterclaims approximately three years after the case was filed.

A. By making only conclusory statements in their opening brief, the Glassburns abandoned their argument on this issue.

The Glassburns' final appellate argument is that Judge Scarborough improperly denied their motion to amend their answer to add counterclaims for breach of contract and breach of contract accompanied by a fraudulent act. (Br. of Appellants at 24–25.) In addition to being incorrect on the merits, this position, like so many others in this appeal, is not preserved for appellate review.

Despite including three paragraphs in their argument, the Glassburns never actually explain ***why*** they believe the trial court abused its discretion. Their first paragraph generally states that Judge Scarborough denied their motion to amend the pleadings. (*Id.* at 24.) The second paragraph contains quotes from case law about the Glassburns' purported right to a jury trial if their newfound counterclaims had ever been grafted onto this case. (*Id.* at 24–25.) And their final paragraph contains nothing more than a conclusory statement that Judge Scarborough improperly denied their motion for leave to amend because "amendment should be freely granted." (*Id.* at 25.)

These generic statements do not provide any insight into how the Glassburns believe Judge Scarborough abused his discretion or otherwise committed legal error. There is a robust body of case law construing Rule 15's standards, but none of that analysis appears anywhere in the Glassburns' brief.

Passing remarks cannot properly preserve an issue for appellate review, as neither the bank nor the Court know what the alleged error is beyond the Glassburns' general dissatisfaction with the trial court's ruling. *See, e.g.*, *State v. Crocker*, 366 S.C. 394, 399 n.1, 621 S.E.2d 890, 893 n.1 (Ct. App. 2005) ("Moreover, conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review."); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (reiterating that "an issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority"). Accordingly, the Court should disregard the Glassburns' argument regarding the denial of their motion to add new counterclaims into this case.

B. The Glassburns' proposed counterclaims were late and futile.

If the Court finds that the Glassburns' argument regarding Judge Scarborough's denial of their motion to add new counterclaims is preserved for appellate review, it should still reject their position on the merits. Rule 15(a), SCRCP, vests a trial court with discretion to permit a party to amend its pleadings when doing so "does not prejudice any other party," and when doing so would not be futile. *See, e.g.*, *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) (refusing to permit amendment of pleadings when the amendment "ultimately would be futile").

Here, Judge Scarborough did not abuse his discretion in denying the Glassburns leave to amend. For one, the case was filed in ***December 2010***, but the Glassburns did not attempt to amend their pleading to assert these counterclaims, which are allegedly based on pre-litigation activities, until ***November 2013***—one month shy of the case's third anniversary. The trial court certainly did not abuse its discretion when it declined to permit the entire scope of the case to change after this protracted, unexplained delay. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 813 (2013) (finding that the trial court did not abuse its discretion in denying a motion to amend made four years after the then-current pleading had been filed).[6]

Additionally, the Glassburns' proposed counterclaims are futile. They allege claims for breach of contract and breach of contract accompanied by a fraudulent act based on the bank's process for reviewing loan modifications. But those procedures do not vest borrowers with any "enforceable rights." *Spaulding*, 714 F.3d at 780 n.5.

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[6] Though Judge Scarborough did not cite the Glassburns' extreme delay in seeking amendment, it is an additional sustaining ground for the trial court's ruling and can properly be relied upon by this Court. Rule 220(c), SCACR.

Moreover, there is no dispute that Mrs. Glassburn has defaulted on her loan agreement. In South Carolina, a party prosecuting a claim for breach of 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." *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (quoting *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951)). Mrs. Glassburn has not made any such showing here and, in fact, has not rebutted evidence of her default. Any proposed counterclaim for breach of contract would necessarily fail.

So, too, for the proposed companion claim of breach of contract accompanied by a fraudulent act, as breach-of-contract is a necessary predicate for this cause of action. *See, e.g., Downs v. FRS, Inc.*, Case No. 0:06-cv-2204-CMC, 2007 U.S. Dist. LEXIS 77214, at *21–22 (D.S.C. Oct. 16, 2007) ("The failure of the breach of contract claim necessarily defeats recovery for breach of contract accompanied by a fraudulent act."). Nor is there any evidence in the Record that could possibly support the fraudulent-intent or fraudulent-act elements of this claim.

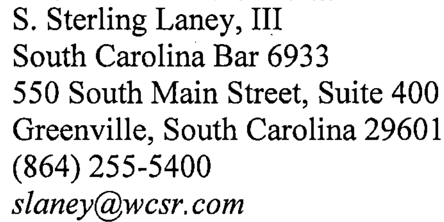
Because the Glassburns were not entitled to add in futile counterclaims almost three years after this case began, Judge Scarborough did not abuse his discretion in denying their motion to amend. The Court should affirm his ruling accordingly.

CONCLUSION

This case involves a simple foreclosure action that the Glassburns are attempting to twist into something more than it is. Because they failed to preserve their arguments for appellate review, and because those arguments fail on their merits in any event, the Court should affirm Judge Scarborough's rulings below.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP



By:______________________________

S. Sterling Laney, III
South Carolina Bar 6933
550 South Main Street, Suite 400
Greenville, South Carolina 29601
(864) 255-5400
slaney@wcsr.com

M. Todd Carroll
South Carolina Bar 74000
1727 Hampton Street
Columbia, South Carolina 29201
(803) 454-6504
todd.carroll@wcsr.com

Attorneys for Respondent

September 15, 2015
Columbia, South Carolina

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SC Court of Appeals

PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondent, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

Pleading: Initial Brief of Respondent

Parties Served:

David Haller
Haller Law Firm, PC
115 River Landing Drive, Suite 102
Charleston, SC 29492

Amanda Reece
Reece Law Firm, LLC
217 Lucas Street, Unit J
Mount Pleasant, SC 29464

Attorneys for Appellants

Edwin T. Mathis

September 15, 2015

WOMBLE
CARLYLE
SANDRIDGE
& RICE
A LIMITED LIABILITY
PARTNERSHIP

1727 Hampton Street
Columbia, SC 29201

Telephone: (803) 454-6504
Fax: (803) 454-6509
www.wcsr.com

Direct Dial: 803-454-7730
Direct Fax: 803-381-9130
E-mail: Todd.Carroll@wcsr.com

September 15, 2015

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SC Court of Appeals

The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: US Bank National Association v. Anne B. Glassburn
Appellate Case No. 2015-000799

Dear Ms. Kitchings:

Enclosed for filing please find Initial Brief of Respondent and Respondent's Designation of Matter.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

Enclosure
cc: David K. Haller
Amanda Reece