THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Circuit Court Case No. 11-CP-08-1754
S.C. Court of Appeals Case No. 2012211306

Angela Drexler.....Appellant,

v.

CitiMortgage, Inc.....Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Angela Drexler (referred to herein as "Appellant"), owned property (referred to herein as "Subject Property") in Berkeley County, South Carolina. In December of 2007, Appellant lost her job and failed to timely make 2008's January installment owed on a mortgage and promissory note held by Massachusetts Mutual Life Insurance Company (referred to herein as "MassMutual"). MassMutual's loan was serviced by Respondent, Citimortgage, Inc. (referred to herein as "Respondent").

On February 12, 2008, Respondent telephoned Appellant and demanded a certified check in the amount of $2,294.73, an amount representing the missed January payment plus the

February payment that had by that time become due. Appellant complied and mailed a certified check on February 19, 2008. Respondent received the certified check but failed to credit the funds to Appellant's account.

Confident she was at that point current on her home loan, Appellant paid March's installment with a personal check on the thirteenth of that month. Respondent received Appellant's March installment check but once again did not credit Appellant's account. Respondent contacted Appellant again, this time demanding three installments, and threatening to foreclose the Subject Property if Appellant did not immediately present the payments demanded. Appellant repeatedly protested Respondent's assertion that the account was materially delinquent, and demanded to know why the certified check had neither been returned to Appellant nor credited to her mortgage account.

It became apparent that Respondent had lost Appellant's certified check. Based on that discovery, Appellant sent photocopies of both the February certified check and the March personal check to Respondent via facsimile transmission. Upon receiving the proof, Respondent assured Appellant that the checks would be located and credited to her account. Satisfied, Appellant express mailed the April installment in the form of another personal check.

In early May 2008, Respondent returned both the March and April personal checks with a cover letter demanding certified funds instead of personal checks. On May 9, 2008, Respondent served Appellant a foreclosure suit.

Appellant immediately contacted Respondent and protested the foreclosure suit. She demanded Respondent's explanation for its failure properly to credit payments submitted to her mortgage account. Again, Respondent placated Appellant and assured her repeatedly that the foreclosure suit would be dismissed provided payment in full of amounts past due were received.

Respondent had still neither returned Appellant's certified check—thus depriving her of those funds— nor credited the proceeds to her account. Consequently, Appellant was unable to bring her account current. By depriving Appellant of either credit for, or a return of, the certified funds, Respondent's acts forced Appellant to choose between paying an attorney to defend the foreclosure suit and having the money to bring her account current. Satisfied by Respondent's assurances that the foreclosure suit would be dismissed if she brought her account current, she chose the latter and defaulted on the foreclosure suit in the middle of June.

By June 16, 2008, Respondent had finally located the certified check it had lost in February. Respondent returned the certified check to Appellant by mailing it to her bank instead of to her directly, which caused even more delay and confusion. As soon as she realized that the certified funds had been returned, Appellant focused all of her efforts on reinstating her mortgage. On August 6, 2008, Respondent instructed Appellant to mail a check in the amount $8,133.35 and again promised that it would dismiss the foreclosure suit if she did so. Respondent did not instruct that Appellant send certified funds. Pursuant to Respondent's instructions, Appellant mailed a check in the amount of $8,133.35 immediately thereafter. Respondent received the check but once again failed to credit the funds to Appellant's account. The foreclosure suit proceeded.

In September, 2008, Respondent demanded a certified check in the amount of $9,010.00 and claimed that it had not received payments and that the account was nine months delinquent. Appellant immediately mailed a certified check in the amount of $9,010.00 via certified mail, return receipt requested. On September 14, 2008, Respondent signed for the certified mail but once again failed to credit Appellant's account. Respondent held the check for ten days before mailing it to Appellant's bank, BB&T.

Respondent did not notify Appellant that the certified check had not been credited to her account or that the funds had been returned to her. Believing that her loan had been reinstated, Appellant paid the October installment by mailing a personal check on October 17, 2008. Respondent received the check but failed to credit the account.

On October 29, 2008, a foreclosure hearing was held and a Judgment of Foreclosure entered. Appellant never received notice of the hearing and consequently did not appear in the matter. The subject property was sold at public auction on December 3, 2008, and shortly thereafter the purchaser, Stonegate Properties, LLC, came to Appellant's doorstep and demanded she to pay $4,000.00 or vacate the premises immediately. Appellant paid Stonegate Properties, LLC the $4,000.00 it demanded, believing that the payment would reinstate her loan.

On February 19, 2009, Appellant retained counsel and filed a Motion to Vacate the Judgment of Foreclosure and Sale pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. A hearing was held on March 18, 2009, and the Court denied Appellant's motion by Order of June 10, 2009. Appellant did not appeal the Court's decision.

Appellant filed the instant lawsuit on June 21, 2011. Her suit seeks, *inter alia*, to recover damages based on negligence, fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, slander of title, negligent misrepresentation, tortious interference with contract, and violations of the South Carolina Unfair Trade Practices Act.

Respondent filed a Motion to Dismiss the Complaint on the grounds of *res judicata* contending that all of Appellant's claims were compulsory counterclaims that should have been brought in the foreclosure action. Respondent further argued that all issues related to the foreclosure judgment and servicing had been fully and fairly litigated in the prior foreclosure action at the hearing on Appellant's the Rule 60(b) Motion and, therefore, Appellant's claims

were also barred by collateral estoppel. A hearing on Respondent's Motion to Dismiss was held before the Honorable Roger Young on October 12, 2011, whereupon Judge Young heard arguments from Appellant and Respondent and took the matter under advisement.

On November 21, 2011, the Trial Court notified the parties, via electronic correspondence, that it had decided, *sua sponte*, to convert Respondent's Motion to Dismiss to a Motion for Summary Judgment and to grant Summary Judgment in favor of Respondent on the bases of both *res judicata* and collateral estoppel. The Order was filed on January 6, 2012.

Appellant filed and served a Motion to Reconsider on January 17, 2012. On January 20, 2012, after serving her Motion to Reconsider, Appellant's attorneys improperly submitted a Consent Order amending the complaint and joining MassMutual, whose identity as note holder had recently been ascertained, as an additional defendant. Appellant's attorneys did not seek Respondent's consent and submitted the order without Respondent's consent reasoning that because of the grant of summary judgment, Respondent's consent was unnecessary. The Consent Order was signed by the Honorable Deadra Jefferson on January 23, 2012 and filed on January 25, 2012.

Respondent submitted its memorandum in opposition to the Motion to Reconsider arguing that Appellant effectively withdrew her Motion to Reconsider when she submitted the Consent Order wherein it was acknowledged that Respondent had been dismissed. Such acknowledgment, reasoned Respondent, admitted the finality of the Order granting summary judgment.

No hearing on Appellant's motion to reconsider was held, but the Trial Court adopted Respondent's argument as to the effect of the improper Consent Order: it denied Appellant's Motion to Reconsider in an Order filed March 6, 2012. Appellant received notice of entry of the

Order on March 7, 2012.

Appellant served her Notice of Appeal on April 4, 2012. The Notice appeals the Order of Summary Judgment in favor of Respondent entered January 6, 2012. The Notice also appeals the Order dated March 5, 2012 and entered March 6, 2012 (same being a ruling on a motion to reconsider).

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BASED ON RES JUDICATA BECAUSE RES JUDICATA IS AN AFFIRMATIVE DEFENSE AND SHOULD HAVE BEEN PLEAD IN RESPONDENT'S ANSWER.

Appellant requested that the Trial Court deny Respondent's motion to dismiss insofar as the motion was based on *res judicata* which is an affirmative defense. [Plaintiff's Memorandum in Opposition to CitiMortgage, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP, p. 4].

Rather than denying the motion, the Trial Court instead converted the motion to summary judgment, *sua sponte*, which it granted in favor of Respondent as to each of Appellant's claims based on, *inter alia*, *res judicata*.

It is settled that *res judicata* is an affirmative defense. See Rule 8(c), SCRCP (listing *res judicata* as an affirmative defense); Lindler v. Baker, 311 S.E.2d 99, 101 (Ct. App. 1984) ("The defense of estoppel by prior adjudication is, of course, an affirmative defense which must be pleaded.") (citing Clifton v. Darlington Fin. Co., 231 S.C. 672, 100 S.E.2d 404 (1957)).

Respondent filed a motion pursuant to rule 12(b)(6), SCRCP and did not raise *res judicata* affirmatively in its answer. A motion to dismiss is an improper method of raising a *res judicata* defense unless the complaint includes the facts of a prior adjudication. Clifton v.

Darlington Fin. Co., 231 S.C. 672, 675, 100 S.E.2d 404, 406 (S.C. 1957). Appellant's complaint discloses the fact that a prior suit involved the same parties, however it also alleges, essentially, that Respondent acted in a representative capacity, was a nominal party, and that under such circumstances Respondent did not satisfy the party identity element of its *res judicata* defense. [Complaint, p. 1, ¶ 1; p. 2, ¶ 8; p. 8, ¶¶ 55-57; p. 9, ¶¶ 59-60; p. 10-11, ¶¶ 65-68; p. 19, ¶¶ 105-109]

The Trial Court should not have permitted Respondent to interpose *res judicata* as a basis for dismissal even though the fact of the prior suit is evident on the face of the complaint because Appellant alleged that Respondent was not the real party in interest or, if it was, acted in a different capacity in the prior suit. Under the circumstances, the trial Court should have denied Respondent's motion to dismiss on the grounds of *res judicata* and directed Respondent to answer the complaint.

II. THE TRIAL COURT ERRED IN CONVERTING RESPONDENT'S MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT AND SUBSEQUENTLY ORDERING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, IN FAILING TO GRANT THE PARTIES AN OPPORTUNITY TO SUBMIT ADDITONAL BRIEFS, AFFIDAVITS AND OTHER MATERIALS IN SUPPORT OR OPPOSITION TO SUMMARY JUDGMENT.

Appellant requested that the Trial Court deny Respondent's Motion to Dismiss because Respondent's Motion to Dismiss presented evidence beyond the parties' pleadings [See, Appellant's Brief in Opposition at 4] A motion filed pursuant to Rule 12(b)(6) confines the Court's inquiry to the allegations appearing in the Complaint. See United Educ. Distribs., LLC v. Educ. Testing Servs., 350 S.C. 7, 13, 564 S.E.2d 324, 327 (Ct. App. 2002) ("A ruling on a motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based solely on the

allegations set forth on the face of the complaint."). Rather than denying the motion, the Trial Court instead converted the motion to one for summary judgment *sua sponte*, which it granted in favor of Respondent. [See, November 11, 2011 Email From Court].

In the instant case, Respondent's Motion to Dismiss contained the pleadings from the prior foreclosure action as an exhibit. [See, Motion to Dismiss] In response to Respondent's Motion to Dismiss, Appellant submitted a memorandum in opposition to Respondent's Motion to Dismiss specifically objecting to the court's consideration of materials outside of the pleadings. [Plaintiff's Memorandum in Opposition to CitiMortgage, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP, p. 4: "Citi's motion presents evidence beyond the parties' pleadings, which is improper because Rule 12(b)(6) confines this Court's inquiry to the allegations appearing in the Complaint."]

Rule 12(b), SCRCP provides, in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading 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.*

Rule 12(b), SCRCP (emphasis added). Appellant was not afforded an opportunity to submit affidavits, additional or supplemental briefs or any other evidence in opposition to summary judgment. Moreover, because Respondent's motion was granted so early in the case, Appellant never had any opportunity to develop the record through discovery. The Court's failure to afford this opportunity is reversible error under the pertinent case law.

In Charleston County Sch. Dist. v. Harrell, 393 S.C. 552, 713 S.E.2d 604 (2011), the South Carolina Supreme Court considered whether a motion to dismiss pursuant to Rule

12(b)(6), SCRCP was properly granted where the trial court considered matters outside of the complaint. In Harrell, the matter considered by the trial court outside of the complaint was a federal district court case involving similar subject matter. In a footnote, the Supreme Court declined to deem the trial court's grant of the motion to dismiss as a de facto grant of summary judgment because the parties were not afforded a reasonable opportunity to introduce other evidence:

> We recognize that a motion to dismiss may be converted into a motion for summary judgment when the court considers matters outside the pleadings. However, in order for the conversion to take place, the parties must be "afforded a reasonable opportunity to introduce evidentiary matters" of their own. Because [Appellant] was not afforded the opportunity to introduce evidence in response to that injected into the matter by the court, we decline to find that this Rule 12(b)(6) motion was converted into a motion for summary judgment.

Harrell, 713 S.E.2d at 608, fn. 4 (citing Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995)).

In Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002), the South Carolina Court of Appeals considered a similar *sua sponte* conversion of a motion to dismiss to a motion for summary judgment. In Pitts, the Court of Appeals upheld the grant of summary judgment where the moving party submitted a memorandum containing additional evidence some six months prior to the order being filed by the Court. Pitts, 574 S.E.2d at 506. The Court of Appeals reasoned that "[b]ecause the judge issued the order six months after the memorandum was filed, there was ample opportunity for the parties to introduce evidentiary matters if they desired." Id.

The instant case is analogous to the case of Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987), wherein the South Carolina Supreme Court ruled that the notice provisions of Rule 56, SCRCP, apply to motions to dismiss that are converted to motions for summary judgment.

See, Brown, 353 S.E.2d at 699 ("The notice provisions of Rule 56 are incorporated into Rule 12(b)(6)."). The Supreme Court in Brown found:

> The trial court gave no notice to the parties that it was going to consider the affidavits [presented prior to the motion hearing] and hear the 12(b)(6) motion as a motion for summary judgment. The first indication that the respondent's affidavits would be used to support the 12(b)(6) motion was the trial court's order of dismissal.

Id. The Brown court further ruled that "the trial court erred in considering the respondents' supporting affidavits in ruling on the 12(b)(6) motion." Id.

In the instant case, the Trial Court never addressed the issue of the admission of material outside of the Complaint until the final order. Appellant was not informed that Respondent's Motion to Dismiss was converted to a Motion for Summary Judgment until November 21, 2011—when the Trial Court notified Appellant's counsel by email of its decision to convert the motion and to grant summary judgment in favor of Respondent. [Email from Mary B. Ramsay, Esq., Law Clerk to the Honorable Roger M. Young, November 21, 2011] At the point that Appellant learned Respondent's Motion to Dismiss had been converted to a Motion for Summary Judgment, the Trial Court had already decided the motion in favor of Respondent, announced that decision to the parties and requested a proposed order to be prepared by Respondent's counsel.

Appellant was never afforded any opportunity to submit affidavits, supplemental briefs or any other materials outside of the Complaint. Accordingly, Appellant is entitled to an Order reversing the Trial Court's grant of Summary Judgment on grounds that Appellant's claims are barred by collateral estoppel and *res judicata* because the Trial Court's *sua sponte* conversion of a motion to dismiss into a motion for summary judgment does not comply with the notice

provision of Rule 56, SCRCP, which the South Carolina Supreme Court has held applies to such conversions. Brown, 353 S.E.2d at 699.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WITHOUT GIVING THE PARTIES AN OPPORTUNITY TO DEVELOP THE RECORD THROUGH DISCOVERY BECAUSE THE INSTANT CASE INVOLVES NOVEL ISSUES OF LAW AND ISSUES REGARDING APPLICATION OF THE LAW TO THE FACTS.

The Trial Court, *sua sponte*, treated Respondent's motion to dismiss as a motion for summary judgment, despite Respondent's arguing that the Court should not and need not do so. [See, Memorandum in Support of Motion to Dismiss at p. 2, fn. 1] Consequently, the Trial Court improperly granted summary judgment when summary judgment was not requested and before Appellant had an opportunity to develop the record through discovery.

The South Carolina Court of Appeals has explained that summary judgment is a "drastic remedy" that should be "cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Cunningham v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003) (citing Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002)).

"Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a *'full and fair opportunity to complete discovery.*'" Schmidt v. Courtney, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) (emphasis added). "Summary judgment is inappropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Id. (quoting Lee v. Kelley, 298 S.C. 155, 378 S.E.2d 616 (Ct. App. 1989)). "Even when there is no dispute as to evidentiary facts, but only as to the

conclusions or inferences to be drawn from them, summary judgment should be denied." Id. (citing Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct.App.2003)).

In Schmidt, the Court of Appeals held that summary judgment should have been denied because the question of law in that case was a novel one, and the application of the law to the facts was in dispute. Id. As in Schmidt, the question of law before the Trial Court (whether *res judicata* applies in a suit complaining of mortgage servicing practices when the actual lender and real party in interest in the prior mortgage foreclosure suit was not the mortgage servicer) was a novel question, and the application of the law to the facts of this case is in dispute. Further inquiry into the facts is necessary to clarify the application of the law. Accordingly, the Trial Court's grant of summary judgment was inappropriate and should be overturned and the parties should be allowed the opportunity to develop the record through discovery.

IV. THE TRIAL COURT ERRED BY GRANTING RESPONDENT'S MOTION TO DISMISS BASED ON COLLATERAL ESTOPPEL BECAUSE THE BASIS FOR RESPONDENT'S COLLATERAL ESTOPPEL DEFENSE IS AN ORDER AND NOT A JUDGMENT AND BECAUSE NONE OF THE DETERMINATIONS ESSENTIAL TO THE ORDER WERE ESSENTIAL TO THE JUDGMENT.

Appellant requested that the Trial Court deny Respondent's Motion to Dismiss insofar as the motion was based on collateral estoppel, on the ground that Respondent relied on determinations made pursuant to an Order, and thatcollateral estoppel requires that determinations be made pursuant to a Judgment.

Rather than denying the motion, the Trial Court instead converted the motion to summary judgment, *sua sponte*, which it granted in favor of Respondent as to each of Appellant's claims based on, *inter alia*, collateral estoppel.

South Carolina courts have adopted the Restatement (Second) of Judgments § 27 (1982) as its general issue preclusion rule. See, S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625, 627 (1991) ("We hereby adopt the general rule as set forth in the Restatement."). Section 27 states:

> When an issue of fact or law is actually litigated and *determined by a valid and final judgment, and the determination is essential to the judgment*, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

Restatement (Second) of Judgments § 27 (1982) (emphasis added).

South Carolina's courts will apply collateral estoppel to prevent relitigation of issues of fact or law only where the issues were *actually litigated* and determined by a *judgment*. See Restatement (Second) of Judgments § 27 (1982). The Trial Court ruled that Appellant's Rule 60(b) Motion satisfies the actual litigation element of Respondent's collateral estoppel defense. But even assuming *arguendo* the Rule 60(b) hearing constituted litigation, the hearing resulted in an Order—not an actual judgment.

Furthermore, South Carolina's collateral estoppel general rule prevents relitigation only of issues of fact or law only where the issues were determined by a judgment "and the determination is *essential to the judgment*". Restatement (Second) of Judgments § 27 (1982) (emphasis added). Respondent's arguments in support of its collateral estoppel defense conflate the effect of an Order with that of a Judgment and confuse the determinations essential to the denial of Appellant's Rule 60(b) Motion with those essential to the entry of the judgment of foreclosure.

The exact determinations essential to support the Order denying Appellant's Rule 60(b) Motion were these: Appellant failed, pursuant to her Rule 60(b)(1) argument, to demonstrate: (1)

mistake, inadvertence, surprise, or excusable neglect AND a meritorious defense AND a sale price so gross as to shock the conscience, or a sale accompanied by circumstances warranting interference. The Order denying the Rule 60(b) Motion would also necessarily need to find that Appellant also failed, pursuant to her Rule 60(b)(3) argument, to demonstrate: (2) fraud, misrepresentation, or other misconduct of an adverse party AND "[Respondent's] freedom from any fault that contributed to a default judgment being rendered against her." [See, Order, June 10, 2009, p. 5] AND a sale price so gross as to shock the conscience, or a sale accompanied by circumstances warranting interference. Rule 60, SCRCP. By way of comparison, at the foreclosure hearing, Respondent was required only to recite facts essential to a foreclosure, because Appellant had defaulted in the suit.

Simply put, the litigation resulted in an Order rather than a judgment, and none of the determinations essential to the Order were essential to the Judgment, which had already been obtained. Consequently, the Trial Court should have denied Respondent's Motion to Dismiss on the grounds of collateral estoppel.

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BASED ON COLLATERAL ESTOPPEL BECAUSE THAT DEFENSE DOES NOT APPLY IN THE CONTEXT OF A DEFAULT JUDGMENT.

Appellant requested that the Trial Court deny Respondent's Motion to Dismiss insofar as the motion was based on collateral estoppel because Respondent did not satisfy the "actual litigation" element of its collateral estoppel defense.

Rather than denying the motion, the Trial Court instead converted the motion to summary judgment, *sua sponte*, which it granted in favor of Respondent as to each of Appellant's claims based on, *inter alia*, collateral estoppel.

South Carolina courts insist on the actual litigation component, having adopted the Restatement (Second) of Judgments § 27 (1982) as its general issue preclusion rule. See S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625, 627 (S.C. 1991) ("We hereby adopt the general rule as set forth in the Restatement."). Section 27 states:

> When an issue of fact or law is *actually litigated* and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

Restatement (Second) of Judgments § 27 (1982) (emphasis added).

Thus, in order for a party to preclude another from relitigating an issue, the party must first demonstrate actual litigation in a prior suit resulting in a judgment. In this case, the judgment in the prior suit was obtained without any issues being litigated at all. Appellant did not develop the record and no discovery was taken. Respondent argued that Appellant's Rule 60(b) Motion justifies the application of collateral estoppel. [Memorandum in Support of CitiMortgage, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP, p. ___] Collateral estoppel's purpose is to conserve judicial resources and is justified by the notion that fairness dictates preventing a party from litigating an issue already decided; it should not be rigidly or mechanically applied because it springs from basic concepts of fairness. See State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998) (citing 50 C.J.S. Judgments §797 (1997)). In this case, considerations of fairness overwhelmingly support Appellant.

A default judgment is obtained without litigation and is therefore not a proper basis for collateral estoppel. See, State v. Bacote,331 S.C. 328, 331, 503 S.E.2d 161, 163 (S.C. 1998) ("In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have

been litigated in the earlier litigation.") (citing 50 C.J.S. Judgments § 797 (1997); see also, State v. Lewry, 550 A.2d 64, 65 (Me. 1988) (citing Spickler v. York, 505 A.2d 87, 88 (Me. 1986)); and see State v. Purvis, 739 S.W.2d 589, 591 (Mo. App. S.D. 1987) (citing Bi-State Dev. Agency v. Whelan Sec. Co., 679 S.W.2d 332, 336 (Mo. App. 1984)). Accordingly, the Trial Court should have denied Respondent's motion to dismiss as to the collateral estoppel defense because the judgment was obtained by default.

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BASED ON COLLATERAL ESTOPPEL BECAUSE THE BURDEN OF PERSUASION EXCEPTION APPLIES IN THIS CASE.

Appellant requested that the Trial Court deny Respondent's Motion to Dismiss insofar as the motion was based on collateral estoppel because Respondent did not satisfy the litigation element of its collateral estoppel defense. [Plaintiff's Supplement to Memorandum in Opposition to Citimortgage, Inc.'s Motion to Dismiss pursuant to Rule 12(b)(6), p. 2].

The Trial Court converted the motion to summary judgment, *sua sponte*, which it granted in favor of Respondent as to each of Appellant's claims based on, *inter alia*, collateral estoppel.

South Carolina courts have adopted the Restatement (Second) of Judgments § 27 (1982) as its general issue preclusion rule. See, S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625, 627 (S.C. 1991) ("We hereby adopt the general rule as set forth in the Restatement."). Section 27 states:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

Restatement (Second) of Judgments § 27 (1982). South Carolina courts have also applied Restatement (Second) of Judgments § 28 (1982), which provides five exceptions to the general issue preclusion rule. See, eg, S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart, 304 S.C. 210, 403 S.E.2d 625, 627 (S.C. 1991) (stating that the court of appeals "adopted the general rule and exceptions as set forth" in Restatement §§ 27, 28 and 29.); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455, 460 (Ct. App. 1997) (applying Restatement (Second) of Judgments § 28 (1982)); Carolina Renewal v. S.C. Dept of Transp., 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009) fn. 2 (observing that "[o]ur courts have relied heavily on the Restatement (Second) of Judgments in developing collateral estoppel jurisprudence."). The exceptions expressed in Section 28 state, in pertinent part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, *relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:*
>
> *(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or*
> *(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action . . . .*

Restatement (Second) of Judgments § 28 (1982) (emphasis added).

Appellant is the party against whom preclusion is sought. If her burden of persuasion was significantly heavier in the initial litigation than in the instant case, collateral estoppel should not bar relitigating any issues.

The only litigation in the prior suit was a hearing on Appellant's Motion to Set Aside Judgment pursuant to Rule 60(b), SCRCP. At that hearing, Appellant was required to

demonstrate either: (1) mistake, inadvertence, surprise, or excusable neglect plus a meritorious defense, or (2) fraud, misrepresentation, or other misconduct of an adverse party plus "[Respondent's] freedom from any fault that contributed to a default judgment being rendered against her." [See, Order June 10, 2009, p. 5] Fulfilling either of the above required showings posed a difficult task, and Appellant's actual task was much more daunting still because the subject property had already been sold to a good faith purchaser at public auction. The Master-in-Equity explicitly addressed this added burden in his Order: "Moreover, *[Appellant] faces an even higher burden since this property has been sold to a third party purchaser.*" [Order June 10, 2009, p. 5 (emphasis added)] In order to overturn a judicial sale, a moving party must demonstrate either: (1) a sale price so gross as to shock the conscience, or (2) a sale accompanied by circumstances warranting interference. See, Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008). Under these circumstances, the probability of Appellant prevailing on her Rule 60 motion was of a very low order.

By way of comparison, for example, Appellant's negligence claim in the instant case merely requires a showing by a preponderance of the evidence that Respondent's sloppiness in servicing her loan injured her.

In light of the simple burden Appellant faces in the instant case, as compared to the onerous task she confronted at the Rule 60 hearing, the Trial Court should have applied the burden shifting exception and denied Respondent's motion to dismiss insofar as it was based on collateral estoppel.

VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BASED ON RES JUDICATA BECAUSE RESPONDENT WAS A NOMINAL A PARTY IN THE PRIOR SUIT.

Appellant requested that the Trial Court deny Respondent's Motion to Dismiss to the extent Respondent relied on *res judicata* as a basis for dismissal because Respondent did not satisfy the party identity element of its *res judicata* defense. [Plaintiff's Memorandum in Opposition to Citimortgage, Inc.'s Motion to Dismiss pursuant to Rule 12(b)(6), p. 14]

In order to sustain the *res judicata* affirmative defense, Respondent was required to establish all three of its elements: 1) identity of the parties; 2) identity of subject matter; 3) the existence of a prior adjudication. See, Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994) (per curiam) (citing Freezer v. R.J. Clarkson Co., 308 S.C. 188, 190, 417 S.E.2d 569, 571 (1992)).

Respondent relied entirely on the case caption of the prior suit to establish the identity of the parties element. Appellant argued that the case caption in the prior suit was a legal fiction and not dispositive of an identity of party inquiry because Respondent's claims in the prior suit were not its own. [See, Memorandum of Law in Opposition to CitiMortgage, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP, p. 14: "[Respondent] was neither holder nor beneficiary of the note in question."; Complaint, p. 10, ¶65: "[Respondent] owned neither the note nor its corresponding mortgage . . . . [Respondent] had not been lawfully appointed as trustee or had the original note assigned to it. . . .[Respondent] was neither note holder nor beneficiary of the note at the time"; see also, Complaint, p. 10, ¶66: "No power of attorney to sue on behalf of another party, such as an owner trustee, was ever produced."]

Proceedings in which parties act in a representative capacity are not at all uncommon:

> [C]ourts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth.

Sprint Commc'n Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 128 S.Ct. 2531, 2543 (2008). Appellant alleges that Respondent's status in the prior suit is analogous to that of executors, guardians, and trustee—all of whom are parties permitted to bring suits on behalf of estates, wards, and trusts, respectively, pursuant to Rule 17(a), SCRCP:

> (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An *executor*, administrator, *guardian*, bailee, *trustee* of an express trust, a party with whom or in whose name a contract has been made for the benefit of another or a party authorized by statute *may sue in his own name* without joining with him the party for whose benefit the action is brought . . . .

Rule 17(a), SCRCP (emphasis added). Rule 17(a) encompasses the most common categories of nominal parties. See, Sprint Commc'n Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 128 S.Ct. 2531, 2558 (2008) (dissent footnote 4) (stating the proposition that parties acting in representative capacities are not real parties in interest and that "[a] guardian ad litem or next friend ... is a nominal party only; the ward is the real party in interest . . . .") (quoting 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1548, pp. 373-374 (2d ed.1990)) (internal quotations omitted).

In the prior suit, a servicing contract with MassMutual most likely authorized Respondent to initiate the claims on MassMutual's behalf, and to bring the suit in its own name. However, because Appellant was denied the opportunity to engage in discovery, Appellant can only speculate as to that fact. But Respondent did not take an assignment of the claims and was therefore a nominal party in the prior suit. When a nominal party in a prior suit asserts *res*

judicata as a defense in a subsequent suit, resolving the identity of parties element of the defense requires the party asserting preclusion to do more than simply reference the case caption. See Williams v. Peadbody, 719 S.E.2d 88, 94 (N.C. Ct. App., 2011) ("[C]ourts will look beyond the nominal party *whose name appears on the record as plaintiff* and consider the legal questions raised as they may affect the real party or parties in interest.") (citing Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)) (emphasis added).

South Carolina appellate courts have not ruled on the effect of shifting capacities of a party, from one suit to the next, in the context of the party identity element of a *res judicata* defense. However, South Carolina courts frequently look to the Restatement (Second) of Judgments for guidance when determining preclusion issues. See, Carolina Renewal v. S.C. Dept. of Transp., 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009) fn. 2, (observing that "[o]ur courts have relied heavily on the Restatement (Second) of Judgments in developing collateral estoppel jurisprudence.").

Under the facts of the instant case, the Restatements call for inquiry into the nature of Respondent's capacity in the prior suit and a determination made regarding whether Respondent's prior capacity, individual or representative, is identical to that in the subsequent suit:

> A party appearing in an action in one capacity, *individual or representative*, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity.

Restatement (Second) of Judgments section 36(2) (1982) (emphasis added). Courts apply the Restatement rule and have concluded that parties in a prior and a subsequent suit must act in the same capacity in both in order to meet the identity of the parties test of a *res judicata* defense.

See, e.g., Hurt v. Pullman Inc., 764 F.2d 1443, 1448 (11th Cir., 1985) (interpreting Alabama law and requiring the party asserting *res judicata* "to appear in the same capacity in both suits.") (citing 1B Moore's Federal Practice p 0.411[3.-1] (2d ed. 1984), Restatement (Second) of Judgments Sec. 36 (1982), 170 A.L.R. 1180)); Brinkman v. Baltimore & Ohio R.R. Co., 111 Ohio App. 317, 324, 172 N.E.2d 154, 159 (Oh. Ct. App. 2 Dist. 1960) ("It is well settled that a former adjudication does not have the effect of res judicata . . . unless the second action is not only between the same parties, but also between them in the same capacity or character.") (citing 23 Ohio Jurisprudence, 1010 et seq.).

The trial court should not have granted summary judgment in favor of Respondent on the basis of *res judicata* because a question of fact respecting Respondent's capacity in the prior suit has been raised.

VIII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BASED ON RES JUDICATA BECAUSE THE SUBJECT MATTER OF THE INSTANT SUIT DIFFERS FROM THAT OF THE PRIOR SUIT.

The Trial Court found in its Order dated January 6, 2012, "that all of [Appellant's] claims against [Respondent] are barred by the doctrine of res judicata because each claim should have been asserted as a compulsory counterclaim or a defense in the foreclosure action." [Order Granting Summary Judgment in Favor of CitiMortgage, Inc., p. 8, ¶ 21] The Trial Court, in support of its above-quoted finding, stated:

> In South Carolina, a party must bring as a counterclaim any claim she has against the opposing party if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require the presence of additional parties over which the court cannot acquire jurisdiction.

[Id., p. 5, ¶ 12] The Trial Court went on to cite the "logical relationship test" to determine that Appellant's claims for negligence, fraud, breach of implied covenant of good faith and fair dealing, breach of contract, unjust enrichment, violation of the South Carolina Unfair Trade Practices Act, tortious interference with contract, quiet title and negligent misrepresentation were all compulsory counterclaims against Respondent in the foreclosure action. [Id., pp. 5-6, ¶¶13-14] The Trial Court reasoned that each of the above-mentioned causes of action

> relate to and arise out of the servicing of [Appellant's] loan and, therefore, bear a logical relationship to the foreclosure action. [Appellant] should have disputed the servicing of her loan, the application of payments, and [Respondent's] standing to foreclose in the previously-filed foreclosure action.

[Id., p. 6, ¶ 14]

Appellant argued in her brief in opposition to Respondent's Motion to Dismiss that the Trial Court should have applied a two-pronged inquiry: first to determine whether Appellant's claims were compulsory counterclaims in the underlying action; and second to determine if the facts necessary to prove any remaining claims were identical to the subject matter of the prior suit. [See, Plaintiff's Memorandum in Opposition to CitiMortgage, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP, pp. 16-17]

"Res judicata bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." Yelsen Land Co., Inc. v. State, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). South Carolina courts have declined to adopt a formulaic test to determine identity of subject matter. See, Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (2011).

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, "*[a] litigant is barred*

> *from raising* any issues which were adjudicated in the former suit and *any issues which might have been raised in the former suit.*"

Id. at 414 (quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999)) (emphasis added).

Res judicata will bar any compulsory counterclaim not raised in the first action. See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002). To determine which claims are barred by res judicata, the Court must determine which claims Appellant needed to raise in the former suit. The rule of procedure governing compulsory counterclaims states:

> A pleading shall state as a counterclaim any claim *which at the time of serving the pleading the pleader has* against any opposing party, *if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim* and does not require for adjudication the presence of third parties of whom the court cannot require jurisdiction.

Rule 13(a), SCRCP (emphasis added). Rule 13(a) calls for a two prong inquiry. First, the Court must determine whether Appellant had any counterclaims at the time her pleading was due. Second, the Court must determine whether any ripe counterclaims arise out of the same transaction or occurrence as the subject matter of Respondent's claims in the prior suit.

As to the first prong of the inquiry into what might have been litigated in the prior suit, the Court must consider the rules of pleading in determining whether Appellant had any ripe counterclaims at the time her pleading was due pursuant to Rule 13(a), SCRCP.. The rules of pleading require a party to plead facts sufficient to sustain a cause of action. "Generally, an action cannot properly be commenced until all of the essential elements of the cause of action are in existence ... the subsequent occurrence of a material fact will not avail in maintaining it." American Agric. Chem. Co. v. Thomas, 206 S.C. 355, 360, 34 S.E.2d 592, 594 (1945).

Additionally, Rule 11(a), SCRCP, requires parties to sign pleadings. By signing a pleading, a party certifies that "there is good ground to support it." Rule 11(a), SCRCP. "[R]ules of procedure, like statutes, should be given their plain meaning." Valentine v. Davis, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct.App.1995) (per curiam).

It is clear that a compulsory counterclaim is one that exists "at the time of serving the pleading". Rule 13(a), SCRCP. Respondent served the Amended Complaint on May 29, 2008 by mailing it to Appellant. Appellant's response, including any compulsory counterclaims, was therefore due on June 18, 2008. Any facts pled in the instant suit as occurring after June 18, 2008, and there are many, could not have been pled at the time the pleading was due to be served in the prior suit. The rules of pleading again, are illustrative of the distinction between compulsory counterclaims and permissive ones. Rule 13(e), SCRCP, creates a mechanism whereby Appellant could have pled the new facts and causes of action:

> (e) *Counterclaim Maturing or Acquired After Pleading.* A claim which either matured or was acquired by the pleader after serving his pleading *may*, with the permission of the court, be presented as a counterclaim by supplemental pleadings.

Rule 13(e), SCRCP (emphasis added). The Court shall give Rules of procedure their plain meaning. Valentine, 460 S.E.2d at 220. Consequently, to the extent facts occurring after June 18, 2008 gave rise to any conceivable causes of action, such causes of action matured and were acquired after the pleading and therefore were not compulsory according to Rule 13(a), SCRCP.

A variety of combinations of the facts alleged in the instant suit occurred after June 18, 2008—the date after which any ripening causes of action ceased to be compulsory—give rise to causes of action. [See, Complaint, pp. 4-6, ¶¶26 – 43]. Appellant has alleged in her Complaint that, as late as September 12 or 13, 2008—some three months after Appellant's answer was due

in the foreclosure action—Respondent assured her that it would dismiss the foreclosure action if she mailed it a certified check in the amount of $9,010.00. [Complaint, p. 4, ¶ 30] Appellant also alleges in her Complaint that she was never notified of a foreclosure hearing nor advised that a judgment had been entered. [Complaint, p. 5, ¶ 38] Appellant further alleges that she was never notified of the time and place of the foreclosure sale. [Complaint, p. 6, ¶ 43] Accordingly, Appellant's claims against Respondent arising out of Respondent's repeated assurances that it would dismiss the foreclosure action if she sent it monies in accordance with its instructions did not arise until after the time for pleading in the foreclosure action had passed and therefore cannot be compulsory counterclaims that existed "at the time of serving the pleading". Rule 13(a), SCRCP.

Appellant bases her causes of action against Respondent not only upon Respondent's actions and representations prior to the filing of the foreclosure complaint, but also on Respondent's actions and representations during the foreclosure process up to and after the foreclosure sale. In light of the rules of pleading, Appellant could not have plead all of the causes of action pled in the instant suit as counterclaims in the prior suit because at least some of those counterclaims would have been absolutely baseless at the time Appellant's counterclaims were due. Consequently, some of Appellant's causes of action were not claims that Appellant would have been forced to raise as compulsory counterclaims in the foreclosure action.

For the second prong of the inquiry into what might have been litigated in the prior suit, determining whether any ripe claims arose out of the same transaction or occurrence as the subject matter of Respondent's foreclosure suit, South Carolina courts have adopted the "logical relationship" test. N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 381 S.E.2d 903

(1989). In DAV Corp., the Supreme Court held that all but one of the defendant's claims were compulsory counterclaims pursuant to the logical relationship test. Id. at 905. The distinguishing factor between the claims held to be compulsory and that held to be permissive was the effect of the claims on the underlying claim of the plaintiff in that case. Id.

DAV Corp. involved an underlying suit to enforce a promissory note and a subsequent suit to enforce an oral agreement that would have avoided default on the promissory note and separate oral agreements involving the plaintiff's purchase of the defendant's interest in the joint venture that was at the center of the conflict between the parties. Id. The distinguishing factor between those claims that were held to be compulsory—the claims that would have avoided default under the promissory note—and the claim held to be permissive—the claim to enforce the plaintiff's purchase of the defendant's interest in their joint venture—was the fact that the former would have affected the plaintiff's ability to enforce the promissory note, whereas the latter would not. Id.

In order to apply the logical relationship test, the Court must first define the subject matter of Respondent's claims in the prior suit. "The 'subject matter of the action,' within the *res judicata* rule, is a matter or thing concerning which a wrong has been done, which is ordinarily property, contract, or other thing involved, or main primary right from the breach of which a remedial right arises." Pye v. Aycock, 325 S.C. 426, 433 480 S.E.2d 455, 458 (Ct.App.1997) (citing First Nat'l Bank of Greenville v. U.S. Fidelity & Guar. Co., 207 S.C. 15, 35 S.E.2d 47 (1945)). The primary right involved in Respondent's foreclosure claim in the prior suit was the right to receive payment of money from Appellant. The primary wrong involved in the prior suit was Appellant's failure to pay. In order to foreclose, a claimant must demonstrate three facts: (1)

Appellant owed money to a party. (2) The party owed never received it. (3) A valid mortgage existed. Those three elements are the subject matter of Respondent's claims in the prior suit.

Under the logical relationship test as applied in N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 381 S.E.2d 903 (1989), if Appellant had any ripe claims at the time her pleading was due in the prior suit that would have affected MassMutual's ability to foreclose on the subject property, such claims satisfy the logical relationship test. Consequently, such claims would have been compulsory in the prior suit and therefore satisfy the subject matter identity element of Respondent's *res judicata* defense.

Several causes of action pled in the instant suit do satisfy the subject matter identity analysis for *res judicata*. For example, Appellant has alleged that the mortgage assignment was invalid. That claim would obviously have affected the foreclosure claim brought in the former suit and therefore has a logical relationship to the subject matter of the prior suit. Since the logical relationship test is met, the claim for invalid mortgage assignment was a compulsory counterclaim in the prior suit and therefore satisfies the subject matter identity element of *res judicata*.

It is similarly clear that any claims in the instant suit based on facts that relate to breach of the mortgage contract would have affected MassMutual's ability to foreclose, even if the facts are used in support of several additional claims, such as claims sounding in tort or arising from statute. "[T]he subject matter of the two suits rests not in their forms of action or the relief sought, but rather, in the combination of the facts and law that give rise to a claim for relief." Judy v. Judy, 383 S.C. 1, 10, 677 S.E.2d 213 (Ct.App.2009) (citing Plum Creek, 334 S.C. at 36, 512 S.E.2d at 109-110) (*aff'd.*, Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (2011)). Any such

claims satisfy the logical relationship test and, assuming such claims were ripe by June 18, 2008, they constitute compulsory counterclaims in the prior suit and therefore satisfy the subject matter identity element of *res judicata*.

In the instant suit, it is unclear how Appellant could be alleging facts of actionable conduct directed at Respondent that would support a breach of contract claim or be useful in affecting the foreclosure since Respondent was not even party to the loan contract. Certainly Appellant pled claims that arose from her dealings with Respondent that were related to the mortgage contract: sloppy servicing of her loan, misapplying and losing payments, and making negligent and/or fraudulent misrepresentations before, during and after the pendency of the foreclosure suit. But it is not clear how any of these claims could have affected MassMutual's ability to foreclose on its mortgage. The Court should consider whether claims brought on the basis of actionable conduct by a third party that results in a breach of contract between two other parties is ever logically related to the subject matter of claims brought pursuant to the broken contract.

Appellant's other causes of action, for violations of the South Carolina Unfair Trade Practices Act, negligence, tortious interference with contract, negligent misrepresentation and fraud would have no bearing whatsoever on the enforceability of the mortgage. Consequently, none of those claims satisfy the logical relationship test as applied in N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 381 S.E.2d 903 (1989).

The instant suit does not concern the subject matter of the prior suit, which involved Appellant's breach of a mortgage contract she had entered with MassMutual. This suit concerns Respondent's misconduct and Appellant has asked for monetary damages as compensation for

those claims. Accordingly, those causes of action do not pass the "logical relationship" test and are not barred by *res judicata*.

IX THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BASED ON RES JUDICATA AND COLLATERAL ESTOPPEL SINCE PUBLIC POLICY PREVENTS APPLICATION OF THE RES JUDICATA DOCTRINE.

Appellant requested that the Trial Court deny Respondent's Motion to Dismiss insofar as it relies on res judicata and collateral estoppels because neither doctrine should be applied when public policy militates against doing so.

South Carolina courts have recognized "numerous exceptions to the application of res judicata and collateral estoppel." Nelson v. QHG, 354 S.C. 290, 306, 580 S.E.2d 171, 179 (Ct. App. 2003).

The exceptions to collateral estoppel are discussed in Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). In Pye, the Court of Appeals adopted the Restatement (Second) of Judgments section 28, which states in pertinent part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . . .
>
> (5) There is a clear and convincing need for a new determination of the issue (a) *because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action*, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Restatement (Second) of Judgments § 28 (1982) (emphasis added). Res judicata is similarly inapplicable in certain circumstances. "The application of res judicata and collateral estoppel 'may be precluded where unfairness or injustice results, or public policy requires it.'" Mr. T. v. Ms. T., 378 S.C. 127, 138, 662 S.E.2d 413, (Ct. App. 2008) (quoting Nelson v. QHG, 354 S.C. 290, 315, 580 S.E.2d 171, 184 (Ct.App.2003) (*rev'd in part,* 362 S.C. 421, 608 S.E.2d 855 (2005))). The South Carolina Supreme Court has acknowledged circumstances in which the policy that underlies the res judicata doctrine must yield to more compelling policies. Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408, 412 (2011).

Neither issue preclusion nor claim preclusion will apply where the public policy of South Carolina supersedes the rationales of either form of preclusion. In the instant case, neither form of preclusion should be applied because their rationales are superseded by two other grounds of stated public policy.

First, res judicata and collateral estoppel must yield to the public policy expressed in S.C. Code Ann. §37-22-190 (1976, as amended) and elsewhere in South Carolina's Consumer Protection Code and in South Carolina's Unfair Trade Practices Act. See, S.C. Code Ann. §39-5-10, et seq. (1976, as amended). The S.C. Code sections referenced proscribe unfair trade practices generally and the following conduct specifically: "a transaction, practice, or course of business in connection with the . . . servicing of . . . a mortgage loan that is not in good faith or fair dealing, that is unconscionable or that constitutes a fraud upon a person[.]" S.C. Code Ann. §37-22-190(A)(8) (2009). These statutorily-expressed public policies proscribing unfair conduct by mortgage servicers outweighs the policy underlying *res judicata* and collateral estoppel for the following reasons: hundreds of thousands of South Carolina residents own homes with

mortgages and the State has a direct interest in protecting the huge number of borrowers likely to be affected, and that have been affected, by wrongful conduct on the part of loan servicers throughout South Carolina. *Res judicata* and collateral estoppel aim at judicial efficiency, both for the parties and the court system- worthy policies. However, their application here defeats the ends of justice.

At this point could anyone suggest that Respondent did not implement unfair practices and procedures in connection with loan servicing and foreclosures in violation of South Carolina statutes? South Carolina's Attorney General joined with forty-eight other Attorneys General in filing a complaint naming Respondent and several other major loan servicers in Federal Court on March 14, 2012. In that lawsuit, U.S. v. Bank of America, *et al*, 1:12-cv-00361-RMC (D.D.C. 2012), the Attorneys General complained that Respondent engaged in unfair practices in connection with the servicing of mortgage loans. [See, U.S. v. Bank of America, *et al*, Complaint Count I]. The Attorneys General also alleged Respondent engaged in unfair and deceptive consumer practices with respect to foreclosure processing. [See, U.S. v. Bank of America, *et al*, Complaint, Count II]. Many of the practices and circumstances of the misconduct in mortgage servicing and foreclosures alleged in the Attorneys General's case is precisely the type of conduct alleged by Respondent in the instant case.

The Court should enforce the State's policy forbidding unfair trade practices and misconduct by loan servicers because those policy goals supersede those of judicial economy and the need for finality of judgments.

Second, *res judicata* and collateral estoppel must yield to the public policy broadly encompassed by two South Carolina Supreme Court Administrative Orders. See, Re: Mortgage

Foreclosures and the Home Affordable Modification Program (HMP), Administrative Order No. 2009-05-22-01; Re: Mortgage Foreclosure Actions, Administrative Order No. 2011-05-02-01.

The two administrative Orders are premised on the existence of federal loss mitigation programs in which Respondent was a participant. The Administrative Orders were necessary because of widespread confusion among loan servicers, like Respondent, difficulty communicating with servicers by homeowners, errant foreclosures, sloppy foreclosure practices, and dual tracking (wherein the servicer offers loss mitigation but pursues foreclosure to conclusion as rapidly as possible, often resorting to outright fraud such as "robo-signing" documents, such as mortgage assignments, as was done in the instant case). Chief Justice Toal's 2011 Administrative Order No. 2011-05-02-01 was in fact a moratorium on foreclosures as long as alternative mitigation discussions were ongoing between a borrower and the servicer.

Had either Administrative Order been in force prior to the judicial sale of the subject property, Appellant would not have lost her property. The Administrative Orders, the first of which was issued shortly after the judicial sale of Appellant's home, supports the argument that the applications of *res judicata* or collateral estoppel in this case would contravene the public policy of South Carolina.

X. THE TRIAL COURT ERRED IN DEEMING APPELLANT'S MOTION TO RECONSIDER AS WITHDRAWN AND THEREFORE MOOT, AND DENYING THE MOTION ON THAT BASIS.

Respondent argued in its Motion to Dismiss that this Court does not have jurisdiction to hear this appeal because the appeal was not timely filed. Respondent based its conclusion on the argument that because Appellant's Motion to Reconsider was deemed by the Circuit Court to have been voluntarily withdrawn in the Order Denying Plaintiff's Motion to Reconsider as Moot,

which is dated March 5, 2012, Appellant would have had to have filed her Notice of Appeal within thirty days of Receiving the Order Granting Summary Judgment in Favor of Respondent. At no time prior to the March 5, 2012 Order Denying Plaintiff's Motion to Reconsider as Moot did Appellant affirmatively withdraw her Motion to Reconsider.

Respondent argues that the Motion to Reconsider necessarily was withdrawn by virtue of the Consent Order for Joinder of an Additional Defendant Pursuant to Rules 19 and 15, SCRCP (hereinafter referred to as the "Consent Order"), wherein Respondent's consent was not sought to add the additional defendant. Respondent argues in its Motion to Dismiss that Appellant, by representing to the Court in the Consent Order that Respondent was no longer a party to the action, Appellant necessarily withdrew her Motion to Reconsider. However, Respondent's argument fails to point out the following language from the Consent Order:

> [T]he contents of this Order and the Amended Complaint leave unmolested the claims of the original Complaint as brought against Defendant CitiMortgage, Inc. because until such time as all appeals have been exhausted, CitiMortgage, Inc. may be ordered back into this case whereupon that Defendant might be required to Answer the claims originally laid against it....

[Consent Order, ¶ 11]. Respondent argues that Appellant affirmatively represented to the Court that Respondent was "finally dismissed from the matter on January 6, 2012." [Respondent's Brief, p. 7]. However, the above-quoted language from the Consent Order clearly notifies the Court that Appellant contemplated taking measures to bring Respondent back into the litigation and that Appellant merely sought to join a necessary party by consent in the meantime.

At no time did Appellant affirmatively withdraw her Motion to Reconsider. Instead, Appellant's withdrawal was judicially imposed by virtue of the Order Denying Plaintiff's Motion to Reconsider as Moot. Appellant did not learn that she had effectively withdrawn her Motion to

Reconsider until March 5, 2012. Respondent has asked this Court retroactively to apply the ruling in the Order Denying Plaintiff's Motion to Reconsider as Moot and thereby dismiss this appeal as untimely filed.

Appellant acknowledges that the Consent Order was submitted to Judge Jefferson improperly because it was delivered to her offices three days after Appellant had served Respondent the motion to reconsider. Appellant's attorneys had intended to complete the Consent Order prior to the deadline for serving the motion to reconsider—January 17, 2012—reasoning that Respondent's consent was unnecessary if submitted before the motion to reconsider which brought Respondent back into the suit. Appellant's attorneys improperly submitted the consent order without seeking Respondent's approval and thereby denied Respondent an opportunity to oppose having MassMutual joined as an additional Defendant. Appellant takes the view that though improper, Respondent was not materially prejudiced by the consent order and any prejudice that did arise is now moot itself as MassMutual has been, with finality, dismissed with prejudice from the suit and because Appellant's Rule 59 Motion was denied.

In any event, Appellant was not notified that the Motion to Reconsider had been effectively withdrawn until March 5, 2012. It would have been impossible for Appellant to know that her Notice of Appeal was due prior to finding out that her motion to reconsider had been deemed withdrawn. The Notice of Appeal was filed within thirty days of Appellant's receipt of the Order Denying Plaintiff's Motion to Reconsider as Moot.

> A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has

been made, the time for appeal for all parties shall be stayed and shall run from receipt of *written notice of entry of the order granting or denying such motion.*

Rule 203(b)(1), SCACR (emphasis added). Appellant did not receive written notice that her motion to reconsider pursuant to Rule 59, SCRCP, had been denied until March 5, 2012, when she was served with the Order Denying Plaintiff's Motion to Reconsider as Moot. Appellant never voluntarily withdrew her Rule 59 motion, but rather was deemed to have withdrawn said motion by virtue of the Court's order dated March 5, 2012. Accordingly, the Notice of Appeal was timely filed and the instant appeal was perfected.

CONCLUSION

Based on the foregoing arguments, Appellant requests the Court remand the case back to the Trial Court so that the record can be developed on all of the bases requested.

Respectfully submitted,

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