

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2013-CP-26-02135

Appellate Case No. 2015-001233

Mitchell D. Snider, Appellant,

v.

CitiMortgage, Inc., Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This action, while brought in the Court of Common Pleas for Horry County, surrounds Appellant Mitchell D. Snider's ("Appellant") dissatisfaction with the terms of his divorce settlement. Specifically, his displeasure with how he and his ex-spouse handled the Note and Mortgage covering real property purchased during their marriage and known as 218 Green Lake Drive, Myrtle Beach, SC 29572 (the "Subject Property") in the divorce settlement. Despite the Family Court¹ retaining jurisdiction to resolve any issues related to the terms of the divorce settlement, Appellant instituted this action against Respondent CitiMortgage, Inc. ("Respondent") and his ex-spouse, Kim Sprinkle Snider ("Ms. Sprinkle"). The Complaint was filed on April 5, 2013, and contained claims against Respondent for (1) declaratory judgment/novation; (2) estoppel; (3) rescission; (4) alleged violation of the South Carolina Consumer Protection Code; (5) breach of contract/breach of the covenant of good faith and fair dealing; and (6) alleged violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").² (*See Compl.*) Through this action, Appellant seeks to rescind a Loan Modification Agreement that gives him and his ex-spouse the option to payoff the debt evidenced by the Note over a longer period of time but, in turn, does not prohibit or penalize him or his ex-spouse from paying it off in a shorter period of time.

Despite Appellant's myriad of claims asserted in the action, the lower court properly determined that, in light of the undisputed facts, South Carolina law simply does not support the relief he seeks against Respondent. The proper resolution of any

¹ Respondent was not a party to the divorce proceedings between Appellant and Ms. Sprinkle.

² The claim for tortious interference with a contractual relationship was not asserted against Respondent and is not at issue in this appeal.

complaint of the Appellant is against Ms. Sprinkle in the Family Court. A brief overview of the undisputed facts and procedural history of the related matter is instructive.

A. 2005: Origination of the Note and Mortgage.

On or about April 26, 2005, Appellant and Ms. Sprinkle signed a Note to refinance their existing indebtedness. The Note was in the original principal sum of \$225,000.00, and had an interest rate of 5.500% (the "Note"). (Ex. A to Mem. in Supp. of Mot. for Sum. J.; Ex. A to Compl.) Pursuant to the terms of the Note, Appellant and Ms. Sprinkle were obligated to repay the original principal sum borrowed on the first day of each month with monthly payments beginning on June 1, 2005. (*Id.*) The monthly principal and interest payment totaled \$1,547.75. (*Id.*) The Note was secured by a Mortgage, also signed by Appellant and Ms. Sprinkle, (the "Mortgage") covering the Subject Property. (Ex. B. to Mem. in Supp. of Mot. for Sum. J.) At the time the Note and Mortgage were signed, Appellant and Ms. Sprinkle were married and residing at the Subject Property as their primary residence. While Respondent did not originate the loan, it is the current holder of the Note and the servicer of the loan. (Ex. C to Mem. in Support of Mot. for Sum. J. at 24:6–13.)

B. 2006: Divorce Proceedings Between Appellant and Ms. Sprinkle.

On or about October 17, 2006, Appellant and Ms. Sprinkle separated. (Exs. D, E to Mem. in Support of Mot. for Sum. J.) On July 2, 2007, they filed a divorce action captioned *Kim S. Snider v. Mitchell Dolon Snider*, 2007-DR-26-1540, in the Horry County Family Court. (*Id.*) Subsequent to the filing, Appellant and Ms. Sprinkle reached a settlement of their divorce case at mediation. (Ex. E to Mem. in Support of Mot. for Sum. J.) The Final Divorce Decree was filed on March 10, 2009, and incorporated the

settlement agreement (the “Divorce Agreement”). (Ex. D to Mem. in Support of Mot. for Sum. J.) The Divorce Agreement required Appellant to pay a lump sum alimony award to Ms. Sprinkle over a period of months, granted Ms. Sprinkle “sole and exclusive ownership and possession” of the Subject Property, and required Appellant to execute a deed conveying his undivided ½ interest in the Subject Property to Ms. Sprinkle. (Ex. E to Mem. in Support of Mot. for Sum. J. at pp.3, 5.) Moreover, the Divorce Agreement spoke to Appellant and Ms. Sprinkle’s agreement as to the Note and Mortgage covering the Subject Property and recognized Appellant’s indebtedness. (*Id.* at p.5.) It acknowledged that Ms. Sprinkle could not refinance the indebtedness, gave Ms. Snider the authority to satisfy the underlying mortgage obligation, and recognized Appellant’s ongoing payment obligations under the Note and Mortgage. (*Id.*) Appellant acknowledges that he remained liable for the debt because the loan was not refinanced as part of the divorce proceedings. (Aff. of M. Snider at ¶ 7; Ex. H to Mem. in Supp. of Mot. for Sum. J. at 29:7–8 (“My *obligation to Kim* ends February 20, 2015.”) (emphasis added).)

If the mortgage payments were not made, the Divorce Agreement gave Appellant recourse against Ms. Sprinkle through Family Court rule to show cause proceedings. More specifically, if the matter came before the Family Court for Ms. Sprinkle’s failure to make the monthly mortgage payments, the Family Court could “require that the home be refinanced, or that the home be sold.” (*Id.* at p.6). Further, if Ms. Sprinkle allowed the loan to go into default, she was required to “indemnify [Appellant] and hold him harmless from and against any liability that may result.” (*Id.*) However, the Divorce Agreement did not, and could not, release Appellant from his indebtedness to Respondent

under the Note. (11/17/15 Aff. of M. Snider at ¶¶ 5–7 (“On April 28, 2009, as part of the divorce settlement, I deeded my one-half (1/2) interest in the property to my ex-wife. Because she was not able to refinance the loan into her name at that time, I *remained obligated* under the Note.”) (emphasis added).).

C. 2011: Default, Modification, and Rule to Show Cause Proceedings.

In 2011, Appellant and Ms. Sprinkle defaulted on the monthly payment obligations under the Note and Mortgage. At that time, Ms. Sprinkle contacted Respondent and began a loan modification review.

By letter dated March 30, 2011, Respondent notified³ Appellant and Ms. Sprinkle that the loan was reviewed and approved for a trial period payment plan beginning May 1, 2011. (Ex. F to Mem. in Supp. of Mot. for Sum. J.; *see also* Ex. N to Mem. in Supp. of Mot. for Sum. J. at Interrog. 10 (noting Ms. Sprinkle informed Appellant that “she was trying to modify the loan, which prompted Mitchell Snider to contact CitiMortgage in April of 2011”).) During the trial period payment plan, Respondent agreed to accept monthly mortgage payments in the amount of \$1,374.37. (*Id.*) The trial period payment plan was completed and the Loan Modification Agreement was executed by Ms. Sprinkle on or about July 15, 2011. (Ex. G to Mem. in Supp. of Mot. for Sum. J.; Ex. B to Compl.) Appellant also “became aware that the subject mortgage loan had been modified” when he “went online to view the account and noticed that the payment amount had changed in July of 2011.” (Ex. N to Mem. in Supp. of Mot. for Sum. J. at Interrog. 11.)

The Loan Modification Agreement outlined Respondent’s agreement to accept lower monthly payments over a longer period of time, but preserved Appellant’s right to

³ The notice was sent to the Subject Property address.

continue (if he so chose) to make the higher monthly payments outlined in the Note. (Ex. G to Mem. in Supp. of Mot. for Sum. J. at ¶ 4 (allowing for prepayment of principal), ¶ 6 (requiring “original loan documents compliance” with the exception of changes to rate), ¶ 7(b) (“All covenants, agreements, stipulations, and conditions in the Note and Security Instrument shall be and remain in full force and effect, except as herein modified, and none of the Borrower’s obligations or liabilities under the Note and Security Instrument shall be diminished or released by any provisions hereof. . . .”).

On September 12, 2011, due to Ms. Sprinkle’s breach of her obligations under the Divorce Agreement to keep the mortgage payments current, Appellant filed a Verified Petition for Rule to Show Cause with the Family Court. (Ex. I to Mem. in Supp. of Mot. for Sum. J.) In the Verified Petition, Appellant acknowledged that he was aware of the ongoing modification efforts, stating that “[Ms. Sprinkle] is in the process of modifying the monthly mortgage payment.” (*Id.* at p.2, ¶ 3.) Further, he stated that “Ms. Sprinkle failed and refused to make the mortgage payments for the month of December 2010, January 2011, and April 2011.” (*Id.* at p.2, ¶ 5.) As recourse for Ms. Sprinkle’s breach of her obligations under the Divorce Agreement, Appellant requested that the Family Court direct the property be sold or allow him to “make all mortgage payments directly to CitiMortgage, with any remaining balance, if any, due and payable to [Ms. Sprinkle].” (*Id.* at p.3, WHEREFORE(C).) In sum, Appellant requested assistance from the Family Court to allow him to forego sending his monthly, required alimony payment to Ms. Sprinkle. Appellant wanted the Family Court to approve him sending what would be his monthly alimony payment directly to Respondent. Any remaining balance after Appellant paid the mortgage would then go to Ms. Sprinkle.

In support of the Petition, Appellant submitted an Affidavit acknowledging the modification efforts undertaken by Ms. Sprinkle and asking that if the Subject Property is not ordered to be sold by the Family Court, that he be able to lower his monthly alimony payments by paying a sum equal to the monthly mortgage payment directly to Respondent. (Ex. J to Mem. in Supp. of Mot. for Sum. J. at ¶ 7.) Specifically, Appellant stated:

In the event [Ms. Sprinkle's] *loan modification* is concluded, *but does not result in my name being removed from the mortgage loan*, I would request, in the very least, that I be allowed to make all future mortgage payments directly to [Respondent], or its assignees, and to pay any net difference, if any, directly to the [Ms. Sprinkle], through February 1, 2015, as provide by the Final Decree.

(*Id.* (emphasis added).) The Rule to Show Cause was heard on July 26, 2012.

In an Order dated August 9, 2012, the Family Court found that Ms. Sprinkle suffered “financial difficulties” “which caused the delinquency in the mortgage payments” and that she “used her best efforts to cure this matter.” (Ex. K to Mem. in Supp. of Mot. for Sum. J. at p.3, ¶ 10.) It further found that Ms. Sprinkle “entered into an agreement with the mortgage holder pursuant to the Home Affordable Mortgage Protection Act (hereinafter HAMP) regarding a reduction in principal and interest as well as providing for the escrow of property insurance and property taxes” and that at the time of the hearing the payments were current. (*Id.* at p.2, ¶ 2.) The Family Court found that the “major dispute between the parties centers upon the fact that [Ms. Sprinkle] had become delinquent for a period of two months prior to entering into the agreement with the lien holder,” but that Ms. Sprinkle also insisted that the alimony payments were not timely made by Appellant. (*Id.* at ¶ 3.) To resolve the Verified Petition, the Family

Court refused to order the sale of the Subject Property and, instead, granted Appellant the alternative relief requested in his Affidavit:

I therefore find and conclude that [Appellant] shall make the ongoing mortgage payment to the mortgage holder in the amount of One Thousand Three Hundred Forty-Four and 09/100th Dollars (\$1,344.09) beginning August 1, 2012 and continuing until the home is sold, Defendant's alimony obligation is completed on February 1, 2015 or the mortgage is satisfied.

(*Id.* at ¶ 6; *see also* Ex. H to Mem. in Supp. of Mot. for Sum. J. at 22:4–13.) The modified monthly mortgage payment was then offset from Appellant's required monthly alimony payment under the Divorce Agreement. (*Id.* at ¶ 7.)

D. 2012: Appellant Makes Modified Monthly Payments to Respondent and Respondent Confirms He May Remain Liable Under Note.

Beginning with the August 1, 2012 payment, Appellant admits submitting the portion of his alimony payment in the amount of the modified monthly mortgage payment directly to Respondent. Appellant continued to submit these payments to Respondent every month through February 2015. (Ex. N to Mem. in Supp. of Mot. for Sum. J. at Interrog. 6.) For each of these payments, Appellant could have chosen to submit the original monthly payment of \$1,547.75, but did not. (*Id.*)

During this time, Appellant also contacted Respondent and asked that his name be removed from the account. In response, Appellant was informed by letter dated November 2, 2012, that the request could not be processed because “[a]ll parties who originally signed the Note, Mortgage and/or Deed are liable for the remaining life of the loan, unless a release of liability assumption request is approved or the loan is refinanced.” (Ex. L to Mem. in Supp. of Mot. for Sum. J.) Ms. Sprinkle never obtained

an assumption, nor did she refinance the debt and, therefore, Appellant was aware that he remained liable for the debt.

E. 2013: Appellant's Lawsuit Against Respondent to Avoid the Debt.

Apparently unsatisfied with the settlement of his divorce case and the Family Court's refusal to force a sale of the property, Appellant made a last-ditch effort to avoid repaying his debts by filing this action against Respondent on April 5, 2013. (Compl.) Appellant's claims against Respondent fall into two categories: (1) those seeking to set aside his indebtedness and (2) those seeking damages. The claims seeking to set aside Appellant's indebtedness are those for novation/declaratory judgment, estoppel, and rescission. (*Id.* at ¶¶ 13–23.) The claims seeking damages are those for breach of contract, alleged violation of the South Carolina Consumer Protection Code, and alleged violation of the SCUTPA. (*Id.* at ¶¶ 24–33, 41–45.) Under both categories, the alleged “bad acts” were Respondent accepting the Loan Modification Agreement with only the signature of Ms. Sprinkle and accepting the Loan Modification Agreement when it was not prepared by an attorney.

Respondent answered the Complaint on June 11, 2013, and the parties began written discovery and depositions. (Ans.) Upon completion of discovery, on August 18, 2014, Respondent filed a Motion for Summary Judgment on all of Appellant's claims. Respondent filed its Memorandum in Support of Motion for Summary Judgment on November 12, 2014. (Mem. in Supp. of Mot. for Sum. J.) The hearing on the Motion for Summary Judgment was initially scheduled for November 17, 2014, but subsequently rescheduled for November 19, 2014, before the Honorable D. Craig Brown. On November 17, 2014, Appellant submitted his Affidavit in response to summary judgment,

and on November 18, 2014, Respondent filed an Objection to the Affidavit. (11/17/14 Aff.; Obj. to Aff.) Appellant filed and served his Response in Opposition to the Motion for Summary Judgment the day of the hearing—November 19, 2014. (Opp. to Mot. for Sum. J.)

Following a hearing on the Motion for Summary Judgment, the court filed a Form 4 Order on January 23, 2015, noting that the Motion was granted and a formal order would follow. (Form 4 Order.) The formal order, filed on February 24, 2015, held that in light of the undisputed facts, there was no genuine issue of material fact and Respondent was entitled to judgment as a matter of law on all claims. (2/24/15 Order.) Appellant filed a Motion to Reconsider on March 9, 2015, asking the court to reconsider only *one issue*, related to *one claim*: whether the fact that Appellant did not sign the loan modification agreement is sufficient to support a claim for rescission? (Mot. to Reconsider.) Respondent filed a Memorandum in Opposition to the Motion to Reconsider on April 13, 2015. (Mem. in Opp. to Mot. to Reconsider.) The order denying the Motion to Reconsider was filed on May 1, 2015. (5/1/15 Order.) This appeal followed on June 5, 2015. Because the lower court did not err in its grant of summary judgment in favor of Respondent, this Court should affirm. Additionally, as outlined herein, Respondent requests that this Court “affirm for any ground appearing in the record as provided by Rule 220(c).” S.C. R. App. P. 208(b)(2).

ARGUMENTS

I. APPELLANT DID NOT APPEAL THE LOWER COURT'S RULINGS ON NOVATION AND ESTOPPEL OR THE LOWER COURT'S FINDING THAT HE HAS NOT SUFFERED DAMAGES AND, THEREFORE, THOSE RULINGS CONSTITUTE THE LAW OF THE CASE.

Appellant fails to appeal the rulings on two of his claims, novation and estoppel, and, therefore, those rulings constitute the law of the case. (2/24/15 Order at ¶¶ 14, 15.) Further, Appellant did not appeal the lower court's finding that he did not suffer any damages and that his credit actually improved during the relevant time-frame. (*Id.* at ¶ 20.) This holding also constitutes the law of the case. *See Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (“An unappealed ruling is the law of the case and requires affirmance.”).

For purposes of the litigation and this appeal, Appellant is bound by the lower court's holding that “the Loan Modification Agreement, based on its plain terms, modifies *the existing agreement, i.e., the Note and Mortgage; and does not extinguish it.*” (2/24/15 Order at ¶ 14 (emphasis added).) Thus, even if Appellant does not want to pay the loan back under the terms of the Loan Modification Agreement, he and Ms. Sprinkle are still bound to repay the debt evidenced by the Note. There simply is no getting around his obligations to repay the funds borrowed in 2005. The question is only whether Appellant and Ms. Sprinkle *must* repay the debt over a period of 20 years, as required by the Note, or *may* repay the debt over a period of 46 years, as allowed by the Loan Modification Agreement. Appellant takes issue with the latter.

The lower court held that estoppel is only an affirmative defense, not an independent claim and, for that reason, Appellant cannot recover damages from Respondent pursuant to this claim. (*Id.* at ¶ 15.) After holding that estoppel is only an

affirmative defense, the lower court went on to hold that Appellant “failed to present any evidence showing that [Respondent] induced him to alter his position, resulting in prejudice to him.” (*Id.*) Appellant is now bound by these unappealed rulings. *See In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (“This ruling is the law of the case since it is not contested on appeal.”).

Finally, because Appellant did not appeal the finding that he has not suffered any cognizable damages or loss as a result of Respondent’s conduct, this finding also constitutes the law of the case and binds Appellant on appeal. (2/24/15 Order at ¶ 20.) In light of the established law of the case, the lower court’s grant of summary judgment in favor of Respondent on all claims which require “damages” as an element of the cause of action is proper.

II. APPELLANT FAILED TO PRESERVE TWO ISSUES ON APPEAL FOR REVIEW BY THIS COURT.

In Appellant’s Initial Brief, he presents six issues for appeal, two of which have not been preserved. (*See* App.’s Initial Br. at p.1.) Specifically, issues 1 and 2, are not preserved for appellate review because the lower court did not issue a ruling in its Order granting summary judgment as to whether a bilateral contract can be modified unilaterally or as to whether CitiMortgage did or did not have a duty to use good business judgment in accepting the Loan Modification Agreement with only one signature. Appellant also failed to request a ruling on these issues in his very limited Motion to Reconsider. (*See id.* (“Statement of Issues on Appeal”); *see also* 2/24/15 Order; Mot. to Reconsider.) Because these two issues are not preserved for review, they cannot be considered by this Court and, accordingly, cannot serve as grounds for reversal of the lower court’s ruling.

“Preserving issues for appellate review is a fundamental component of appellate practice.” *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001). The error preservation rules definitively require two criteria to be met before an issue is preserved for appellate review: (1) raise the issue to the circuit court, and (2) obtain a ruling on the issue from the circuit court. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000). The litigant must specifically raise the issue and also obtain a ruling on that issue from the circuit court. See, e.g., *Wilke*, 330 S.C. at 76, 497 S.E.2d at 733. If the circuit court does not rule on the specific issue, it is incumbent on the losing party to file a motion in accordance with Rule 59, SCRPC, requesting a ruling from the circuit court on that specific issue that was left unaddressed. See *S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Grp.*, 347 S.C. 333, 343, 554 S.E.2d 870, 876 (Ct. App. 2001). Failure to follow these explicit rules renders the issue not preserved for appeal.

The Order granting summary judgment in favor of Respondent did not address or rule on these issues. Moreover, while Appellant filed a Motion to Reconsider, it was very limited in scope and did not request a ruling from the circuit court on either of the first two issues outlined in the Statement of Issues on Appeal. Therefore, Issues 1 and 2, are not preserved for appellate review and cannot serve as grounds for reversal of the lower court’s Order. To the extent this Court considers the unpreserved issues, they fail on the merits as outlined below.

A. Appellant's Argument that the Trial Court Incorrectly Found that a Bilateral Contract Cannot be Modified Unilaterally Ignores the Actual Ruling of the Trial Court and Ignores Applicable Law.

Appellant argues that the lower court “erred in determining that [Respondent] could change the terms of the Note without Appellant’s consent and over his express objection.” (App.’s Initial Br. at p.9.) In this section, Appellant argues that state contract law requires a “meeting of the minds” for the modification to be valid, that federal law does not “preempt” state contract law, and that the Loan Modification Agreement included language requiring the signature of the borrowers. (*Id.* at pp.9–21.) As noted in Section II, *supra*, the lower court never ruled on whether state contract law required Appellant to consent to the Loan Modification in order for it to be valid or whether preemption was at play in this case. However, even if the issues were somehow preserved, the arguments necessarily fail.

1. *It is “Standard Industry Practice” to Excuse the Signature of a Borrower Where there is a Divorce and Quit Claim Deed to the Other Borrower.*

While Appellant spends a considerable portion of his brief discussing express and implied preemption, the lower court never considered or ruled upon preemption in the Order granting summary judgment. The lower court also did not rule on preemption in the Order denying the limited Motion to Reconsider. Instead, the lower court looked to and ruled on the impact of “standard industry practice” on Appellant’s claim for rescission. (5/1/15 Order at ¶ 5(a).)

As part of the Troubled Asset Relief Program, Congress directed certain “[r]esidential mortgage loan *servicing standards*” be implemented by the Secretary of the Treasury and subsequently carried out by servicers. 12 U.S.C. § 5219 (emphasis added).

The Secretary was required to “implement a plan that seeks to maximize assistance for homeowners and use [its] authority . . . to encourage the servicers of the underlying mortgages . . . to take advantage of . . . other available programs to minimize foreclosures.” *Id.* at (a)(1). Fannie Mae, the undisputed owner of the loan at issue in this case, is considered the financial agent for the Treasury, and serves to assist in administering these “other available programs to minimize foreclosures.” (*See* Fannie Mae Announcement 09-05R, April 21, 2009; Mem. in Supp. of Mot. for Sum. J. at p.12.).

Further, as part of the Emergency Economic Stabilization Act of 2008, Congress sought to “provide authorities and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States” and “to ensure that such authority and such facilities are used in a manner that . . . preserves homeownership.” 12 U.S.C. § 5201(1), (2)(B). To further facilitate this goal, servicers, such as Respondent, were provided protection from liability from investors and other parties when approving a qualified loss mitigation plan:

A servicer that is deemed to be acting in the best interests of all investors and other parties under this section shall not be liable to any party who is owed a duty . . . and shall not be subject to any injunction, stay, or other equitable relief to such party, based solely on the implementation by the servicer of a qualified loss mitigation plan.

15 U.S.C. § 1639a(b). The guidelines used by servicers were also provided protection when Congress found that “[t]he qualified loss mitigation guidelines issued by the Secretary of the Treasury under the Economic Stabilization Act of 2008 shall constitute *standard industry practice* for purposes of all Federal and State laws.” *Id.* at 1639a(c) (emphasis added). The lower court’s finding was that, as outlined below, the signature exception applied by Respondent in this case was a “standard industry practice” subject

to protection under federal law—not a preemption of state contract law. (See Ex. B to Mem. in Supp. of Mot. for Sum. J. at ¶ 16 (“This Security Instrument shall be governed by federal law and the law of the jurisdiction where the Property is located.”).)

The loan that is the subject of this case, as a Fannie Mae loan, is subject to the Mortgage Selling and Servicing Contract (“MSSC”), which incorporates by reference the terms of the Fannie Mae servicing guidelines and servicing announcements. This includes the requirement that the servicers abide by HAMP directives. See FNMA Single Family 2011 Servicing Guide, Pt. I, Ch. 2, § 201; Pt. VII, Ch. 6, § 609 <https://www.efanniemae.com/sf/guides/ssg/svcg/svc061011.pdf>. In instances where a borrower is not eligible for HAMP, servicers are required to consider alternative loss mitigation options as protected and encouraged by 12 U.S.C. § 5219. See *id.* at Pt. VII, Ch. 4, § 401; see also *id.* at Pt. VII, Ch. 6, § 609.04.07. More specifically, the guidelines outline the signature exception for when the borrower and co-borrower are divorced:

In cases where a borrower and co-borrower are unmarried and either borrower or coborrower *relinquish all rights to the property securing the mortgage loan through a recorded quitclaim deed*, the *non-occupying borrower that has relinquished property rights is not required* to provide income documentation or *to sign the HAMP documents but remains liable for the outstanding mortgage debt*.

Id. at Part VII, Ch. 6, § 609.04.06 (emphasis added). This exception has, under the guidelines, carried over to other loss mitigation options, including non-HAMP related modifications, short sales, and deeds-in-lieu. See *id.* at Part VII, Ch. 6, § 610.03.

Based on the foregoing, the guidelines set forth in Fannie Mae’s servicing guide are those implemented pursuant to 12 U.S.C. § 5219, to be carried out by servicers, and are considered “standard industry practice.” 15 U.S.C. § 1639a(c). Because the

undisputed facts evidence that Appellant and Ms. Sprinkle were unmarried at the time of the modification and Appellant deeded his interest in the Subject Property to Ms. Sprinkle, Respondent followed “standard industry practice” in excusing Appellant’s signature. As Appellant was aware in April 2011, “he would remain liable for the underlying debt even in light of the resulting Loan Modification Agreement.” (2/24/15 Order at ¶ 19; *see also* M. Snider Aff. at ¶ 15.)

Appellant failed to present any case law supporting an argument that the lower court may only consider this “standard industry practice” if it preempts state contract law. Courts commonly consider the interplay between state and federal law and, where applicable, can apply both. The lower court properly found that Respondent complied with the servicing guidelines implemented by the Secretary of the Treasury and adopted by Fannie Mae when it excused the signature of Appellant.

2. *State Contract Law Provides that Acceptance Can Exist Through Conduct.*

Additionally, even ignoring the fact that Appellant’s signature can be excused in accordance with “standard industry practice,” his argument that state contract law requires his acceptance for the Loan Modification Agreement to be binding is fatally flawed. The undisputed facts evidence that Appellant accepted the modification through performance.

In April 2011, Appellant was aware that Respondent would not remove his name from the loan even if Ms. Sprinkle obtained the modification. (2/24/15 Order at ¶ 19; *see also* M. Snider Aff. at ¶ 15.) Additionally, in July 2011, Appellant became aware of the fact that the loan was modified. (Ex. N to Mem. in Supp. of Mot. for Sum. J. at Interrog. 11.) Then, in September 2011, Appellant asked the Family Court to allow him to offset

his alimony payments by paying the modified mortgage payment amount to Respondent rather than paying Ms. Sprinkle his full monthly alimony payment. (*Id.* at Exs. I and J.) This is important because Appellant admits that he remained obligated under the Note and, therefore, was contractually obligated to pay Respondent the monthly mortgage payment and separately obligated by court order to pay Ms. Sprinkle the monthly alimony payment. Appellant obtained a financial benefit from going to the Family Court by obtaining an offset in alimony. (Aff. of M. Snider at ¶ 7.) Appellant then proceeded to pay the lower modified mortgage payment to Respondent every month for 2 ½ years—from August 1, 2012, to February 1, 2015. (Ex. N to Mem. in Supp. of Mot. for Sum. J. at Interrog. 6; Ex. H at 21:17–22:21.) The undisputed facts evidence that Appellant performed on the Loan Modification Agreement by paying the lower modified payment, even after he knew that it did not remove him from the loan, thereby accepting its terms.⁴ See, e.g., *Scott v. Mid Carolina Homes, Inc.*, 293 S.C. 191, 359 S.E.2d 291 (1987), *overruled on other grounds by Ward v. Dick Dyer and Assocs., Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991).

Finally, South Carolina law also provides that “[a] written contract may be modified by the parties thereto in any manner they choose.” *Mebane v. Taylor*, 164 S.C. 87, 94, 162 S.E. 65, 68 (1932). Here, the Note, on its face, states that “[t]he Note Holder may enforce its rights under this Note against each person individually or against all of us together.” (Ex. A to Mem. in Supp. of Mot. for Sum. J. at ¶ 8.) Where “more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including *the promise to pay the full amount owed.*” (*Id.*

⁴ Appellant wrote to Respondent in 2012, asking that his name be removed from the loan and he was informed that he remained “liable for the remaining life of the loan.” (Ex. L to Mem. in Supp. of Mot. for Sum. J.)

(emphasis added).) “This means that any one of us [Appellant and/or Ms. Sprinkle] may be required to pay all of the amounts owed under this Note.” (*Id.*) Appellant and Ms. Sprinkle are each individually liable for the entire amount of the debt.

The Loan Modification Agreement also does not materially or adversely impact Appellant’s and Ms. Sprinkle’s obligation to repay the entire debt owed. Instead, it serves as Respondent’s waiver of its right to collect the money over a 20 year period. The modification allows—but does not require—Appellant and Ms. Sprinkle to repay the debt over a 46 year period. (*See id.* at ¶ 4 (“I have the right to make payments of Principal at any time before they are due. . . . I may make a full Prepayment or Partial Prepayment without paying a Prepayment charge.”); Ex. B to Mem. in Supp. of Mot. for Sum. J. at ¶ 12 (“Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower.”); Ex. G to Mem. in Supp. of Mot. for Sum. J. at ¶ 6(b), (c).) In fact, if Appellant is not satisfied with Ms. Sprinkle making the lower monthly payments over the 46-year period, he can makeup the difference with his own payment each month so that the loan is satisfied in 20 years. As a result, the modification does not run afoul of state law contract law principles.

3. *This Court May Affirm on the Basis of an Additional Sustaining Ground: Ratification.*

Even though the trial court opted not to rule on whether Appellant ratified the Loan Modification Agreement, this Court may affirm on that basis. *See* S.C. R. App. P. 220(c); *see also Dreher v. S.C. Dep’t of Health & Env’tl. Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) (“[A]n appellate court may affirm the lower court’s decision for

any reason appearing in the record, the prevailing party may—but is not required to—raise additional sustaining grounds to support the lower court’s decision.”).

It is long-recognized law in South Carolina, that a party may ratify a contract by accepting, acquiescing, and performing under the same. *See Franklin Sugar Refinancing Co. v. Merchants’ Grocery Co.*, 133 S.C. 274, 278, 130 S.E. 886, 887 (1925) (“With full knowledge of its rights, the defendant accepted, paid the freight, took the sugar from the carrier, and sold a part of it, thereby making a complete ratification of the contract.”).

Ratification can result in several ways:

- (1) by intentionally accepting the benefits under the contract;
- (2) by remaining silent or acquiescing in the contract for a period of time after he has the opportunity to avoid it; or
- (3) by recognizing its validity by acting upon it, performing under it or affirmatively acknowledging it.

See Hyman v. Ford Motor Co., 142 F. Supp. 2d 735, 748 (D.S.C. 2001). In this case, Appellant ratified the Loan Modification Agreement by recognizing it, asking the Family Court for the opportunity to make monthly payments to Respondent instead of alimony payments to Ms. Sprinkle, and performing through submission of monthly modified payments for over 2 and ½ years. (See Ex. J at ¶ 7 and Ex. K at ¶ 6 to Mem. in Support of Mot. for Sum. J.) Because Appellant acknowledged the existence of the Loan Modification Agreement and admittedly made the monthly payments thereunder, he cannot be “permitted to ratify that part of the contract which is advantageous to [him]”—such as the lower monthly payment—“and repudiate that which is burdensome”—remaining obligated on the underlying debt. *Southern Bell Tel. & Tel. Co. v. WRNO*,

Inc., 216 S.C. 533, 535, 59 S.E.2d 146, 147 (1950). For these reasons, ratification serves as an additional sustaining ground to affirm the lower court ruling.

4. *The Signature Requirement in the Loan Modification Agreement is a Condition Precedent that May be Waived by Respondent.*

Finally, to the extent Appellant relies on the “Signature Requirements” language in the Loan Modification Agreement, it is a condition precedent that may be excused by Respondent. Paragraph 10 of the Loan Modification Agreement provides as follows:

Signature Requirements. Borrower(s) understand that the Lender’s consent to this Agreement is conditioned upon all Borrower(s) properly signing and returning this Agreement without any alterations or deletions and making all monthly payments when due.

(underlined emphasis added). The language on its face notes that *Lender’s consent* is “conditioned.” Under South Carolina law, Respondent had the right to waive or excuse this condition. Accordingly, affirmance of the lower court holding is proper.

South Carolina law provides that “[i]f a contract contains a condition precedent, that condition must either occur *or it must be excused* before a party’s duty to perform arises.” *McGill v. Moore*, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009) (emphasis added). Where a “condition [is] inserted solely for the benefit of one” party, it “cannot be taken advantage of by the other party.” *Ehlke v. Nemec Const. Co., Inc.*, 298 S.C. 477, 480, 381 S.E.2d 508 (Ct. App. 1989) (citation omitted). In this case, the condition precedent of the borrower signature is unquestionably for the protection of Respondent. It states on its face that it relates to the “*Lender’s consent* to this Agreement.” Accordingly, Appellant’s arguments to the contrary are unsupported and unavailing.⁵

⁵ Appellant argues that waiver is generally a fact question and, therefore, the jury should decide if Respondent waived the condition precedent. This argument ignores the fact that this case was decided on summary judgment. (App.’s Initial Br. at p.18.) Pursuant to Rule 59(e), SCRCP, to defeat summary

B. Appellant's Argument Regarding a Duty to Use "Good Business Judgment" is Not Supported By Any Identified Law or the Record.

Appellant's unpreserved argument that Respondent had a duty to use "good business judgment" in the modification process is the quintessential example of an unsupported argument that is deemed abandoned on appeal. A review of the argument evidences that Appellant fails to cite any precedent to support a finding that a statement in the servicing guide constitutes a "duty" recognized by South Carolina law. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding the failure to provide arguments or cite to authority in support of argument constitutes abandonment of an issue on appeal); *see also Atl. Coast Builders & Contrs., LLC v. Lewis*, 730 S.E.2d 282 n.1 (S.C. 2012) ("Although Lewis has raised this issue on appeal, we find it abandoned as the argument in her brief is purely a recitation of facts, devoid of any citation to legal authority, with the summary conclusion that Atlantic breached the lease."); *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory.").

In addition, the question of whether a duty exists is one of law. *See Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007) ("The existence of a duty owed is a question of law."). Despite Appellant's allegations that a duty arose between Appellant and Respondent from the Fannie Mae servicing guidelines, South Carolina courts have held that a lender generally owes no independent duty to its customer and, instead, the relationship is one of creditor-debtor. *See Regions Bank v.*

judgment and allow the case to proceed to a jury, Appellant had the burden of coming forward with *specific facts* showing that there was a genuine issue for trial as to whether Respondent excused this condition. He did not and could not come forward with such specific facts. The entire record evidences the contrary—that Respondent did, and always intended to, excuse the condition.

Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Accordingly, any duties owed would be those existing by way of the contractual agreement between the parties. In this case, Appellant failed to appeal the lower court's ruling on the breach of contract claim. (2/24/15 Order at ¶ 17.) In any event, the existence of this alleged independent duty is irrelevant for purposes of Appellant's claims. Appellant failed to assert any claims related to an independent duty arising in law, such as negligence. Therefore, even if this argument is considered on appeal, the independent duty claimed is not recognized by South Carolina law as between Appellant and Respondent and Appellant failed to state any cause of action which hinges on a common law duty.

Finally, the record does not contain any evidence of a breach of this alleged "duty" by Respondent. Appellant failed to present any testimony, deposition excerpts, or written discovery responses which evidenced a failure by Respondent to use "good business judgment" when modifying the loan. Contrary to Appellant's conclusory arguments, the only evidence in the record establishes that Respondent complied with "standard industry practice" and continually informed Appellant that he would remain obligated to repay the debt. For these reasons, Appellant's "duty" argument is unfounded.

III. THE TRIAL COURT PROPERLY HELD THAT A LOAN MODIFICATION AGREEMENT IS NOT A "CONSUMER CREDIT TRANSACTION" OR "CONSUMER LOAN" FOR PURPOSES OF THE SOUTH CAROLINA CONSUMER PROTECTION CODE.⁶

"Statutory interpretation is a question of law." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010).

⁶ Appellant states that the "trial court failed to take into consideration both the stated purpose of [sic] Consumer Protection Act and the fact that the Modification directly affects a 'consumer loan' protected under the Consumer Protection Act." (App.'s Initial Br. at p. 21.) Neither of these arguments was ruled upon by the lower court or raised in Appellant's motion to reconsider. They are not preserved for review. *See Second Injury Fund*, 389 S.C. at 431, 699 S.E.2d at 691 ("An unappealed ruling is the law of the case and requires affirmance.").

Where the statute is clear on its face, and the facts are undisputed, the lower court simply applies the unambiguous statute to the undisputed facts and reaches its ruling as a matter of law. *See Brooks v. Northwood Little League*, 327 S.C. 400, 406, 489 S.E.2d 647, 650 (Ct. App. 1997) (“In South Carolina, the primary rule of statutory construction is to give statutes their plain and ordinary meaning where the statute’s language is unambiguous.”). Here, the question before the lower court was whether a loan modification—not the execution of the Note and Mortgage at origination—is subject to certain disclosure requirements in the South Carolina Consumer Protection Code. Appellant’s contention is that the “*modification of the Note*” is the “consumer transaction” at issue for purposes of the South Carolina Consumer Protection Code claim. (Compl. at ¶¶ 26–27 (emphasis added); *see also* Ex. N to Mem. in Supp. of Mot. for Sum. J. at Interrog. 14.) Respondent and the lower court disagreed.

The lower court properly applied the unambiguous statutory scheme to the undisputed facts and held that the Loan Modification Agreement does not meet the definition of “consumer credit transaction” or “consumer loan” to support a cause of action under the South Carolina Consumer Protection Code as a matter of law. (2/24/15 Order at ¶ 18.) Summary judgment favor of Respondent was proper and this Court should affirm for several reasons.

A. A Loan Modification Agreement Does Not Qualify as a “Loan,” let alone a “Consumer Loan.”

A “consumer loan” is “a loan made by a person regularly engaged in the business of making *loans* in which:

- (a) the debtor is a person other than an organization;
- (b) the debt is incurred primarily for a personal, family, or household purpose;

- (c) either the debt is payable in installments or a loan finance charge is made; and
- (d) either the principal does not exceed twenty-five thousand dollars or the debt is secured by an interest in land.”

S.C. Code Ann. § 37-3-104 (emphasis added). At the outset, a loan modification does not result in the making of a “loan” as that term is defined by S.C. Code Ann. § 37-3-106, because it is not the “creation of debt” nor “forbearance of debt arising from a loan.” S.C. Code Ann. § 37-3-106. Moreover, recent South Carolina precedent holds that a loan modification does not result in a new loan or the creation of debt. In *Crawford v. Central Mortgage Co.*, the South Carolina Supreme Court held:

A loan modification is an adjustment to an *existing* loan to accommodate borrowers who have defaulted. In contrast, refinancing is the issuance of an entirely new loan, often used by home owners to take advantage of lower interest rates.

404 S.C. 39, 47, 744 S.E.2d 538, 542 (2013) (emphasis added). The Loan Modification Agreement at issue in this case is not a new loan and, therefore, the South Carolina Consumer Protection Code is inapplicable.

Further, despite Appellant’s blanket contention on appeal that the “loan at issue in this case satisfies all four of the Consumer Protection Act’s listed requirements,” the Loan Modification Agreement necessarily fails to satisfy the definition of “consumer loan” since the underlying Note is secured by a first-lien Mortgage on real estate. (App.’s Initial Br. at p.22.) Appellant conveniently ignores S.C. Code Ann. § 37-3-105, which provides that loans secured by a first-lien interest in real estate are specifically excluded from the definition of “consumer loan.” In this case, it is undisputed that the underlying Note executed by Appellant and Ms. Sprinkle in 2005, was secured by a first-

lien Mortgage on the Subject Property and, for this reason, the “loan at issue in this case” is not a consumer loan. Accordingly, even if the Appellant were correct that the South Carolina Consumer Protection Code applies to any document or agreement that “*directly affects* a ‘consumer loan’ protected” by the statutory scheme, the underlying loan at issue in this case is not a “consumer loan” since it is secured by a first-lien interest in real estate. (App.’s Initial Br. at p.21 (“Further, the trial court failed to take into consideration both the stated purpose of[sic] Consumer Protection Act and the fact that the Modification directly affects a ‘consumer loan’ protected under the Consumer Protection Act.”).) Therefore, the Loan Modification Agreement does not “directly affect” a “consumer loan” as Appellant contends and he was not entitled to any disclosures required by S.C. Code Ann. § 37-3-303.⁷

Finally, as an additional sustaining ground, loans secured by a first-lien mortgage on real estate are not subject to the disclosure requirements of S.C. Code Ann. § 37-3-303. *See* S.C. R. App. P. 220(c); *see also Dreher*, 412 S.C. at 250, 772 S.E.2d at 508 (“[A]n appellate court may affirm the lower court’s decision for any reason appearing in the record, the prevailing party may—but is not required to—raise additional sustaining grounds to support the lower court’s decision.”). The statutory scheme provides that loans excluded from the definition of “consumer loan” because they are first-lien mortgages are still subject to “[c]ivil liability for violation of disclosure” requirements found in S.C. Code Ann. § 37-5-203, and “[v]oluntary complaint resolution” found in S.C. Code Ann. § 37-6-117.” S.C. Code Ann. § 37-3-105(2). Notably, however, S.C. Code Ann. § 37-5-202, *i.e.*, the damages section associated with failure to provide the required disclosures

⁷ Interestingly, the *only* South Carolina federal or state case applying S.C. Code Ann. § 37-3-303, is *In re Mattison*, No. 05-05082, 2005 Bankr. LEXIS 2718 (Bankr. D.S.C. Dec. 29, 2005), and it involved a loan secured by a vehicle, not a first-lien mortgage on real estate (or modification thereof).

under S.C. Code Ann. § 37-3-303, is not included.⁸ Therefore, the notice required by S.C. Code Ann. § 37-3-303, does not apply to first-lien mortgage loans.

For all of these reasons, the Loan Modification Agreement does not qualify as a “consumer loan” sufficient to invoke the disclosures required by S.C. Code Ann. § 37-3-303. The lower court properly held that Respondent was entitled to judgment as a matter of law on this claim and this Court should affirm the lower court’s ruling on this issue.

B. A Loan Modification Agreement Does not Qualify as a Consumer Credit Transaction.

The Loan Modification similarly does not qualify as a “consumer credit transaction.” The South Carolina Consumer Protection Code defines “consumer credit transaction” as:

a consumer credit sale (§ 37-2-104) or consumer loan (§ 37-3-104) or a refinancing or consolidation thereof, a consumer lease (§ 37-2-106), or a consumer rental-purchase agreement (§ 37-2-701).

S.C. Code Ann. § 37-1-301(11). The Loan Modification Agreement in this case is not a consumer credit sale, consumer loan, consumer lease, or consumer rental purchase agreement.⁹ Also, as the South Carolina Supreme Court recognized in *Crawford*, a loan modification is not a “refinancing” or “consolidation” thereof. 404 S.C. at 47, 744 S.E.2d at 542 (noting distinction between a loan modification and a refinance). Rather, it is an “adjustment to an existing loan.” *Id.* A review of each definition in turn evidences that the lower court ruling was proper.

⁸ Appellant claims he was entitled to disclosures pursuant to S.C. Code Ann. § 37-3-303.

⁹ Appellant argues only that the Loan Modification Agreement is a “consumer loan” and, therefore, a “consumer credit transaction” under S.C. Code Ann. § 37-1-301(11). Appellant fails to argue that the Loan Modification Agreement is a “consumer credit sale,” or a “refinancing or consolidation thereof,” “a consumer lease” or a “consumer rental-purchase agreement.” Accordingly, any argument as to these definitions is waived by Appellant, but they are each addressed to show that the Loan Modification Agreement would not qualify as a “consumer credit transaction” under any of the applicable definitions.

Starting with a “consumer credit sale,” defined in S.C. Code Ann. § 37-2-104, it applies only to the “*sale of goods, services, or an interest in land*” where credit is granted by someone who regularly engages as a seller in credit transactions, where the goods, services, or interest in land is “purchased primarily for a personal, family, or household use,” and where the debt is “payable in installments or a credit service charge is made.” S.C. Code Ann. § 37-2-104(1) (emphasis added). The record fails to present even a scintilla of evidence that the Loan Modification Agreement resulted in the *sale of goods, services, or an interest in land*. To the contrary, Appellant and Ms. Sprinkle purchased the Subject Property well before the Loan Modification Agreement came into existence. The Loan Modification Agreement, as stated in *Crawford*, merely made an “adjustment to [the] existing loan,” namely that Respondent would accept lower monthly payments and not hold them in default. (Ex. G to Mem. in Supp. of Mot. for Sum. J.)

Moving to “consumer loan,” the Loan Modification Agreement does not satisfy the definition of S.C. Code Ann. § 37-3-104, for the reasons outlined in Section V(A), *supra*; namely, it is not a “loan,” it did not create the debt, and the underlying loan is secured by a first-lien mortgage on real estate.

Finally, the Loan Modification Agreement does not satisfy the definitions of “consumer lease” or “consumer rental-purchase agreement” because neither goods nor a rental agreement are at issue in this case. *See* S.C. Code Ann. § 37-2-106 (consumer lease is a lease of goods for a term of more than 4 months and an amount which does not exceed \$25,000); S.C. Code Ann. § 37-2-701(6) (consumer rental-purchase agreement is “an agreement for the use of personal property by an individual primarily for personal, family, or household purposes, for an initial period of four months or less . . . that is

automatically renewable with each payment and that permits the consumer to become the owner of the property”).

The Loan Modification Agreement is simply not a “consumer credit transaction.” The lower court was proper in issuing its grant of summary judgment in favor of Respondent and this Court should affirm.

C. A Refinance is Distinct from a Loan Modification Agreement and the Rules of Statutory Construction Dictate that the Inclusion of One is Necessarily the Exclusion of the Other.

In arguing that the South Carolina Consumer Protection Code applies to the Loan Modification Agreement, Appellant argues that Respondent’s reliance on *Crawford* is erroneous. Appellant contends that the case is inapplicable because it addressed the question of whether a licensed attorney is required to supervise the execution of a loan modification agreement in South Carolina. (App.’s Initial Br. at pp.23–24.) Appellant’s argument is misplaced. Nowhere in Respondent’s briefing or argument before the lower court did it argue that *Crawford* was a case determining the applicability of the South Carolina Consumer Protection Code to loan modifications. Rather, Respondent relied on *Crawford* for the well-recognized distinction in law between a loan modification and a refinance—a distinction which Appellant fails to contest. (Aff. of M. Snider at ¶ 7.) This distinction between a loan modification and a refinance is relevant when applying the definition of “consumer loan” or “consumer credit transaction” to the undisputed facts of this case.

In *Crawford*, the South Carolina Supreme Court recognized that a loan modification is distinct and different from a refinance and does not require the same protections. 404 S.C. at 47, 744 S.E.2d at 542. This holding was particularly relevant to

Appellant's claim that the loan modification was, in-and-of-itself, a "consumer loan." Because the South Carolina Supreme Court recognized that a loan modification is merely the "adjustment of *an existing* loan" and a refinance "is the issuance of an *entirely new* loan," the loan modification, as a legally distinct document, cannot constitute a "refinance or consolidation" of a consumer loan to bring it within the parameters of the South Carolina Consumer Protection Code. *Id.* (emphasis added).

In conjunction with *Crawford*, Appellants also argue that the "trial court failed to consider the absence of any provision excluding loan modifications from protection under the Consumer Act." (App.'s Initial Br. at p.24.) This argument, at the outset, is not preserved for appellate review. *See S.C. Second Injury Fund*, 389 S.C. at 431, 699 S.E.2d at 691 ("Issues *and arguments* are preserved for appellate review only when they are raised and ruled on by the lower court." (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) (emphasis added)). While Appellant raised the argument in his Memorandum in Opposition, the lower court did not rule on this argument and Appellant failed to request a ruling in his Motion to Reconsider. *See id.* Even if considered on appeal, the argument runs counter to the cannon of construction "*expressio unius est exclusion alterius*" or "*inclusion unius est exclusion alterius*" which holds that "to express or include one thing implies the exclusion of another, or of the alternative." *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (citing "Black's Law Dictionary 602 (7th ed. 1999).) The definitions of "consumer loan" and "consumer credit transaction" include specific types of debt/transactions which satisfy those definitions. By including "refinances" and "consolidations" of consumer loans as consumer credit transactions, it necessarily excluded modifications of consumer loans as

a consumer credit transaction. And, Appellant fails to address how any transaction under the undisputed facts constitutes a “consumer loan” where the underlying debt is secured by a first-lien mortgage on real estate.

The Loan Modification Agreement is distinct and different from a refinance. No new loan was created. Appellant’s arguments to the contrary are unsupported by the unambiguous statutes at issue and South Carolina law. The South Carolina Consumer Protection Code is inapplicable and the lower court properly granted summary judgment in favor of Respondent. This Court should affirm.

IV. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT ON THE SCUTPA CLAIM.

The lower court’s grant of summary judgment in favor of Respondent on the SCUTPA claim should be affirmed on appeal. As outlined herein, Appellant only includes one of the two bases for the lower court’s ruling in his statement of issues on appeal and, therefore, the two-issue rule applies. Additionally, the lower court’s rulings on both bases are proper. And, finally, Appellant failed to appeal the finding of the trial court that the undisputed facts establish that Appellant has not suffered any damages as a result of Respondent’s conduct. Therefore, the finding that Appellant has not suffered damages is the law of the case, rendering him unable to satisfy the actual loss requirement for an SCUTPA claim. For all of these reasons, the lower court’s decisions should be affirmed.

A. The Two-Issue Rule Necessitates Affirming the Lower Court Ruling.

The stated issue on appeal for purposes of the SCUTPA claim invokes only one of the bases for the lower court’s ruling in favor of Respondent. Appellant asks: “Is the consumer mortgage industry exempt from the South Carolina Unfair Trade Practices

Act?” (App.’s Initial Br. at p.1, Issue 4.) In the Order granting summary judgment, the lower court found that the SCUTPA claim is barred by the regulated industry exemption, but also found that the undisputed facts before it established that the conduct complained of was not, as a matter of law, unfair or deceptive. (2/24/15 Order at ¶ 19.) Because Appellant failed to raise the second ruling in his stated issue on appeal, the two-issue rule applies and affirmance is necessary.

South Carolina precedent provides that “[t]he statement of each issue on appeal shall be concise and direct[.]” *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). “Every ground on appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to ‘grope in the dark’ to ascertain the precise point at issue.” *Id.* at 346, 692 S.E.2d at 903 (citing *Forest Dunes Assoc. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990).) “[W]here a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.” *Id.*; *see also* S.C. App. Ct. R. 208(b)(1)(B) (“Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.”). In sum, an “unchallenged ruling, right or wrong, is the law of the case and requires affirmance.” *First Union Nat’l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998).

The issue on appeal for purposes of the SCUTPA cause of action, as stated by Appellant, is whether the “consumer mortgage industry [is] exempt from the South Carolina Unfair Trade Practices Act.” (App.’s Initial Br. at p.1, Issue 4.) The lower court found not only that the regulated industry exception applied, but also that “[t]he

undisputed facts evidence that [Appellant] was aware of the loan modification review, aware that his signature would not be required for modification, and aware that he would remain liable for the underlying debt even in light of the resulting Loan Modification Agreement.” (2/24/15 Order at ¶ 19.) In light of these undisputed facts, the lower court found that the “conduct was not, as a matter of law, unfair or deceptive sufficient to invoke the SCUTPA.” (*Id.*) By failing to include this issue in the statement of issues on appeal, it constitutes an unchallenged ruling and, whether right or wrong, is the law of this case. *Soden*, 333 S.C. at 566, 511 S.E.2d at 378.

B. There is No Error in the Lower Court’s Finding that the Regulated Industry Exception Applies to a Loan Modification Agreement.

The SCUTPA has a clearly defined exemption from liability where a defendant operates within a regulated industry. *See* S.C. Code Ann. § 39-5-40(a). Specifically, the exemption provides that the SCUTPA does not apply to “[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.” *Id.* (emphasis added). The South Carolina Supreme Court has interpreted this exemption “to exclude from the UTPA those actions or transactions which are allowed or authorized by a regulatory agency or other statutes.” *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 339 S.C. 322, 338, 732 S.E.2d 166, 174 (2012) (citing *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996) (emphasis added)).

In this case, the lower court properly held that the actions of Respondent are exempt from liability under the SCUTPA because of the regulated industry exception. (2/24/15 Order at ¶ 19.) As discussed in Section II(A)(1), *supra*, the signature exception

for loan modifications where the borrowers are divorced and one borrower quit claim deeds his interest to the other borrower is “standard industry practice” recognized by the Secretary of the Treasury as a “[r]esidential mortgage loan servicing standard[s]” pursuant to 12 U.S.C. § 5219. This is the exact type of “allowed” or “authorized” action by a “regulatory agency or other statutes” that falls within the parameters of the exemption. *RFT*, 339 S.C. at 338, 732 S.E.2d at 174. In fact, in *Crawford*, the South Carolina Supreme Court recognized the “existence of a robust regulatory regime” governing loan modifications. 404 S.C. at 47, 744 S.E.2d at 542; *see also* S.C. Supreme Court Admin. Order No. 2011-05-02-01; S.C. Supreme Court Admin. Order No. 2009-05-22-01.

The case cited by Appellant, *Ward v. Dick Dyer and Assocs., Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991), actually supports Respondent’s argument. In *Ward*, the Court relied on a Tennessee court of appeals case noting that the “purpose of the exemption is to insure that *a business is not subjected to a lawsuit* under the Act *when it does something* required by law, or does something that would otherwise be a violation of the Act, but *which is allowed under other statutes or regulations.*” 304 S.C. at 156, 403 S.E.2d at 312 (citing *Skinner v. Steele*, 730 S.W.2d 335 (Tenn. App. 1987)). Here, Respondent complied with the signature exception which is specifically allowed as “standard industry practice” under “other statutes or regulations.” *Id.* Appellant seemingly recognized the fallacy in his argument and reliance on *Ward* during the argument on the Motion for Summary Judgment:

And what the Supreme Court basically said was the rule is this, most industries, in particular the banking industry and mortgage industry are regulated, most of them are. But unless and until there is a conflict between on the one hand,

for example, a[sic] CitiMortgage following a specific law or regulation [*i.e.*, the signature exemption as standard industry practice] and the attempted; enforcement of that by [*i.e.*, a claim for violation of the SCUTPA] --- let me start over, Your Honor.

(Trans. at 43:7-12.)

Appellant also agreed that the exemption applies if Respondent operated pursuant to a statute or regulation:

They said, in order for you to get the regulatory exemption what you've got to prove is that that regulatory field has a regulation that your industry is following and that, and in turn you then get the exemption. So in other words, take this case for example, if they're right, if there is in fact a specific law or regulation that CitiMortgage's employees follow to the letter of the law that gave them the right to do what they did in this case, I agree, they are one hundred percent exempt from the South Carolina Unfair Trade Practices Act pursuant to the rule spouse in this case, period.

(*Id.* at 44:2-13.) Respondent did so act, as explained in Section II(A)(1) and, therefore, the exemption applies. If the regulated industry exemption does not apply to the case at hand, there is simply no situation in which it would apply. The signature exemption was created as a residential mortgage loan servicing standard as mandated by the Secretary of the Treasury. As such, it constitutes "standard industry practice" and is exempt from the SCUTPA. The lower court's ruling should be affirmed.

C. There is No Evidence of Unfair or Deceptive Conduct in the Record.

While Appellant failed preserve the question of whether the lower court's ruling was proper in finding that there was no evidence of unfair or deceptive conduct, Appellant's arguments on this point are also unavailing. There is no evidence in the

record of an “unfair” or “deceptive” act committed by Respondent. This Court should affirm on this basis.

“An act is ‘unfair’ when it is offensive to public policy or when it is immoral, unethical, or oppressive.” *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013). Further, “[a]n act is ‘deceptive’ when it has a tendency to deceive.” *Id.* There is no evidence in the record of “unfair” or “deceptive” conduct by Respondent. Instead, the record reflects that Appellant knew as early as April 2011, that Respondent would not remove him from the loan or forgive his obligations on the debt when it entered into the modification discussions with Ms. Sprinkle. (Aff. of M. Snider at ¶ 15; Ex. N to Mem. in Supp. of Mot. for Sum. J. at Interrog. 10.) Further, in July 2011, Appellant was aware that the loan was modified. (Ex. N at Interrog. 11.) Knowing the loan was modified and also knowing that Respondent would not remove him from the loan as a result of the modification, Appellant petitioned the Family Court to allow him to offset his permanent alimony payment requirements. (Exs. I and J to Mem. in Supp. of Mot. for Sum. J.) Necessarily then, Appellant was aware *before and after* the loan was modified that Respondent would not remove him from the loan or forgive his debt obligations through the modification process.

If Appellant did not like the longer term, he could continue to pay the loan back by supplementing the payments made by Ms. Sprinkle. As recognized by Appellant, because Ms. Sprinkle did not refinance, “[he] remained obligated under the Note.” (Aff. of M. Snider at ¶ 7.) Further, the signature exception is “standard industry practice.” See Section II(A)(1), *supra*. Therefore, Respondent’s reliance on the signature exception

necessarily cannot be unfair or deceptive to Appellant. For these reasons, the evidence in the record fails to create a genuine issue of material fact as to whether Respondent's actions were unfair or deceptive and Respondent was entitled to judgment as a matter of law. The lower court ruled in accordance with these findings. (2/24/15 Order at ¶19.)

Additionally, because the motion before the lower court was one for summary judgment, Respondent initially bore the burden of establishing the absence of a genuine issue of material fact. *See* S.C. R. Civ. P. 56; *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once Respondent met this burden, as outlined above, Appellant had to come forward with specific facts showing there was a genuine issue for trial. *See* S.C. R. Civ. P. 56(e). Appellant admitted the facts outlined above and he failed to come forward with specific facts showing some evidence of unfair or deceptive conduct by Respondent.

Even on appeal, Appellant still fails to reveal what about Respondent's conduct was unfair or deceptive. The record evidences that (1) the trial period payment plan was sent to the property address (as required by the note and mortgage), (2) the loan modification agreement was sent to the same place, (3) Appellant knew the amount of the payment pre-modification and post-modification, (4) Appellant knew Ms. Sprinkle was asking for a modification and that the payments had been lowered, resulting in him paying a lower mortgage payment and off-setting his alimony payment and (5) Respondent *told him* that his signature was not required for the modification and his name would not be taken off the debt. There is simply, as the lower court found, nothing unfair or deceptive about this process. In sum, Appellant knew about the loan modification, accepted the benefits of it and made payments pursuant to its terms;

therefore, he cannot credibly assert that there was a genuine issue of material fact as to whether Respondent's conduct was unfair or deceptive. This Court should affirm.

D. Appellant Failed to Appeal the Lower Court's Finding that He Suffered No Actual Damages and, Therefore, He Cannot State a SCUTPA Claim.

In the Order granting summary judgment, the lower court held that Appellant failed to come forward with evidence showing that his "credit had been damaged in light of the Loan Modification Agreement." (2/24/15 Order at ¶ 20.) The lower court found that Appellant "admitted that his credit actually *improved* during the relevant time frame." (*Id.* (emphasis added).) Moreover, the lower court held that any "*alleged future damages* would be considered uncertain, contingent, and speculative, at best." (*Id.* (emphasis added).) For these reasons, the lower court properly granted summary judgment for lack of damages on "all claims currently asserted by Plaintiff." (*Id.*) Appellant did not move to reconsider the lower court's finding that he has not currently suffered any actual loss or damage and, therefore, it is the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

Because the lower court's ruling on damages is the law of the case, Appellant cannot succeed on a claim under the SCUTPA. The statute provides:

Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages.

S.C. Code Ann. § 39-5-140(a) (emphasis added). In order to "recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive

act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff *suffered monetary or property loss* as a result of the defendant's unfair or deceptive act(s)." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006) (emphasis added). Here, the law of the case is that Appellant has not yet suffered any loss or damage as a result of Respondent's conduct. (2/24/15 Order at ¶ 20.) Therefore, Appellant cannot meet the third element of a cause of action under the SCUTPA and this Court can affirm the lower court's ruling based on this additional sustaining ground. *See, e.g., State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms.*, No. 27502, 2015 S.C. LEXIS 249, at *24 (S.C. July 8, 2015) ("SCUTPA requires that a private claimant suffer an *actual* loss, injury, or damage, and requires a causal connection between the injury-in-fact and the complained of unfair or deceptive acts or practices.") (emphasis in original).

V. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT ON THE RESCISSION CLAIM.

Appellant brought a claim for rescission arguing that the Loan Modification Agreement should be rescinded since it "was not signed by [Appellant]," "was not supervised by an attorney, and neither party to the modification was represented by counsel." (Compl. at ¶¶ 20–23.) The lower court initially granted summary judgment in favor of Respondent finding that Appellant's "theory does not support a claim for rescission in light of the South Carolina Supreme Court's decision in *Crawford v. Central Mortg. Co.*, 404 S.C. 39, 47, 744 S.E.2d 538, 542 (2013)." (2/24/15 Order at ¶ 16.) Following the Order, Appellant filed the Motion to Reconsider noting that the "Third Cause of Action for Rescission . . . was based upon two separate legal theories;" the first

being the alleged unauthorized practice of law¹⁰ and the “second, that the loan modification agreement did not contain Mr. Snider’s signature.” (Mot. to Reconsider at ¶ 1.)

Appellant’s Motion to Reconsider asked only that the lower court to rule whether the lack of Appellant’s signature on the Loan Modification Agreement gives rise to a material fact for trial on the rescission cause of action. (*Id.* at ¶ 4.) The lower court held that it did not for several reasons: (1) the waiver of the signature exception constitutes “standard industry practice” under 15 U.S.C. § 1639a(c); (2) the signature language in the Loan Modification Agreement is for the benefit of Respondent and, therefore, can be excused or waived by Respondent; and (3) Appellant was judicially estopped from seeking rescission in light of his representations by Affidavit to the Horry County Family Court during the rule to show cause proceedings. (5/1/15 Order.) Appellant’s Fifth Issue on appeal argues the “trial court erred in making the determination that Appellant was judicially estopped from seeking rescission of the Modification.” Appellant is incorrect and the lower court ruling should be affirmed.

A. Judicial Estoppel Applies to the Undisputed Facts of this Case.

Judicial estoppel prevents a litigant from pursuing a position that is inconsistent with or conflicts with a position that the litigant has previously set forth in the same or related proceedings. *See Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). The doctrine serves to ensure “the integrity of the judicial process.” *Id.* It applies when five elements are met: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related

¹⁰ The alleged unauthorized practice of law issues is addressed in Section VI, *infra*, and is raised by Appellant as his Sixth Issue on appeal. (App.’s Initial Br. at p.1, Issue 6, pp.32–33.)

proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Id.* at 215–16, 592 S.E.2d at 632. In this case, if Appellant was allowed to acknowledge the existence of the Loan Modification Agreement and offset his alimony payments to Ms. Sprinkle by paying the modified monthly mortgage payment to Respondent and then turn around and ask that the agreement be rescinded, his actions would run afoul of these principles. The lower court found that judicial estoppel barred the rescission cause of action and this Court should affirm.

The undisputed facts in the record establish each of the five elements of judicial estoppel. There are two proceedings at issue here: the Family Court rule to show cause proceedings and the action that is the subject of this appeal. The undisputed facts in the record establish that Appellant knew of the existence of the modification prior to filing a petition for rule to show cause in the Family Court, Appellant asked the Family Court to allow him to offset his alimony payments to Ms. Sprinkle by paying the modified monthly mortgage payment, and now, in a separate action, Appellant seeks to rescind the same modified agreement that he acknowledged and paid on in the Family Court case. These facts meet every element of judicial estoppel. *See Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997) (applying judicial estoppel where appellant claimed he had no legal interest in property held by his son in a divorce proceeding, and then asserted that he owned that property in a later litigation proceeding).

More specifically, the record reflects that Appellant was admittedly aware of the existence of the modification in July 2011, when he viewed the account information online and noticed that the monthly payment changed. (Ex. N to Mem. in Supp. of Mot. for Sum. J. at Interrog. 11.) Moreover, the record further reflects that three months earlier, in April 2011, Appellant contends that he called Respondent and was informed that the modification was going forward and he would not be removed of his obligations under the Note as a result. (*Id.* at Interrog. 10; 11/17/14 Aff. of M. Snider at ¶ 15 (outlining discussions with Respondent in April 2011 and admitting that “I then asked if my name would be removed from the loan if it was approved (as Kim had informed me). The representative replied that she could not remove my name from the loan since it was neither a refinance nor an assumption.”.) With this knowledge, on September 12, 2011, Appellant files the Verified Petition for Rule to Show Cause with the Family Court in which he acknowledged the modification process. (Ex. I to Mem. in Supp. of Mot. for Sum. J. at p.2, ¶ 3.) At that time, knowing that the loan was modified as of July 2011, and knowing that Respondent did not release him of his obligations because the modification was neither a refinance nor an assumption, Appellant asked the Family Court to allow him to lower his alimony payment and “make all mortgage payments directly to CitiMortgage, with any remaining balance, if any, due and payable to [Ms. Sprinkle].” (*Id.* at p.3, WHEREFORE(C).) Appellant wanted to avoid having to pay his full monthly alimony payment to Ms. Sprinkle and also pay his monthly mortgage payment on a property in which he no longer resided.¹¹

¹¹ Appellant argued in the Family Court case that Ms. Sprinkle should be held in willful contempt for failing to make the monthly mortgage payments in a timely manner. (Ex. I to Mem. in Supp. of Mot. for Sum. J.)

In support of the Verified Petition, Appellant also submitted an Affidavit to the Family Court. (Ex. J to Mem. in Supp. of Mot. for Sum. J.) In the Affidavit, Appellant, acknowledging that the modification may “not result in my name being removed from the loan,” asked the Court to allow him to offset his monthly alimony payments by paying the modified monthly mortgage payment to Respondent through February 1, 2015, if the Family Court refused to order the Subject Property sold. (*Id.* at ¶ 7.). Appellant failed to object to Ms. Sprinkle’s resolution of the delinquency in the mortgage payments through the modification or ask the Family Court to order Ms. Sprinkle to pay the original monthly mortgage payment amount rather than the modified payment amount.

The Family Court ultimately entered an Order granting Appellant the alternative relief requested in his Affidavit and Verified Petition:

I therefore find and conclude that [Appellant] shall make the ongoing mortgage payment to the mortgage holder in the amount of One Thousand Three Hundred Forty-Four and 09/100th Dollars (\$1,344.09) beginning August 1, 2012 and continuing until the home is sold, Defendant’s alimony obligation is completed on February 1, 2015 or the mortgage is satisfied.

(Ex. K to Mem. in Supp. of Mot. for Sum. J. at ¶ 6.) The modified monthly mortgage payment was then offset from Appellant’s required monthly alimony payment under the Divorce Agreement. (*Id.* at ¶ 7.) Importantly, when Appellant began paying the monthly mortgage payments in August 1, 2012, he failed to pay the original monthly payment amount of \$1,547.75. Had Appellant objected to the modification in the Family Court proceedings and paid the original monthly payment amount perhaps he could have avoided the judicial estoppel issue. But, he did not and, therefore, the lower court ruling on this issue was proper.

Despite the undisputed facts and his unambiguous position in the Family Court case, Appellant argued before the lower court that he is no longer obligated on the loan. These are inconsistent positions. Further, the proceedings before the lower court were “related” in that both address the payment of the modified monthly mortgage payment. *See Quinn v. Sharon Corp.*, 343 S.C. 411, 414–15, 540 S.E.2d 474, 476 (Ct. App. 2000) (holding that judicial estoppel applied where appellant stated in two earlier proceedings that his daughter owned/operated the corporation and he had no authority; but claimed in later litigation that he was the sole owner of the corporation). Appellant also received a very real and tangible benefit from the earlier proceeding. The Family Court allowed him to reduce his alimony payment by, instead of paying the alimony to Ms. Sprinkle, using the alimony payment to pay the mortgage payment. (Ex. J to Mem. in Supp. of Mot. for Sum. J. at ¶ 7.) This allowed him to avoid having to make his required alimony payment to Ms. Sprinkle and the monthly mortgage payment for the debt he admittedly borrowed and still owed. These actions resulted in Appellant deliberately misleading the court in making two separate statements wholly inconsistent with one another by acknowledging that he was responsible for making the mortgage payments whether or not his name stayed on the mortgage loan after the loan modification and, in this case, arguing that he was no longer responsible for making those same payments. (*Id.*); *see also Wright v. Craft*, 372 S.C. 1, 38, 640 S.E.2d 486, 506 (Ct. App. 2006) (quoting *Hayne*, 327 S.C. at 252, 489 S.E.2d at 477) (“[w]hen a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him”).

Thus, all five prongs of judicial estoppel are met in this case, the lower court did not err in granting summary judgment in favor of Respondent on the rescission claim, and this Court should affirm.

B. The Two-Issue Rule Requires Affirmance of the Lower Court's Grant of Summary Judgment on the Rescission Claim.

The lower court's ruling on the rescission cause of action should also be affirmed under the two-issue rule. In addition to finding that the rescission claim was barred by the doctrine of judicial estoppel, the lower court also found that the actions of Respondent were "standard industry practice" and that the signature of Appellant could be waived by Respondent. (5/1/15 Order at ¶ 5(a), (b).) Because Appellant failed to raise either of these additional rulings in his stated issue on appeal, the two-issue rule applies and affirmance is necessary. *See Jones*, 387 S.C. at 346, 692 S.E.2d at 903 ("[W]here a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *see also* S.C. App. Ct. R. 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.").

In this case, the unchallenged, additional rulings of the lower court, *i.e.*, that the rescission claim fails due to the application of "standard industry practice" and that the signature requirement could be waived by Respondent—"right or wrong, is the law of the case and requires affirmance." *Soden*, 333 S.C. at 566, 511 S.E.2d at 378.

VI. SOUTH CAROLINA PRECEDENT DICTATES THAT ATTORNEY SUPERVISION IS NOT REQUIRED FOR A LOAN MODIFICATION.

The lower court also rejected Appellant's argument that the Loan Modification Agreement is subject to rescission where an attorney does not supervise its creation

and execution. (2/24/15 Order at ¶ 16.) The lower court's finding in favor of Respondent was based on the South Carolina Supreme Court's recent ruling in *Crawford*. Appellant appeals this ruling arguing that the "trial court erred in determining that a loan modification agreement that materially changes the terms of a loan to the detriment of one borrower could be executed without the supervision of a South Carolina attorney." (App.'s Initial Br. at p.32.) At the outset, Appellant fails to cite to any evidence in the record or finding by the lower court that the Loan Modification Agreement (1) materially changes the terms of the loan or (2) that it is to the detriment of one borrower. Moreover, Appellant fails to cite any authority for his argument that *Crawford* is inapplicable. Thus, this argument is abandoned under South Carolina appellate court precedent. *McLean*, 314 S.C. at 363, 444 S.E.2d at 514 (finding the failure to provide arguments or cite to authority in support of argument constitutes abandonment of an issue on appeal).

Further, Appellant's argument before the lower court was that the Loan Modification Agreement was null and void due to the lack of supervision by a licensed attorney and should, therefore, be rescinded. (Compl. at ¶ 23.) Despite Appellant's conclusory contentions to the contrary, the South Carolina Supreme Court's holding in *Crawford*, finding that a loan modification agreement does not require the supervision of a licensed attorney, is directly related to that argument. The lower court properly looked to and applied *Crawford* in finding that summary judgment in favor of Respondent was proper on this theory. (2/24/15 Order at ¶ 16.)

In *Crawford*, the South Carolina Supreme Court considered the then "novel question of whether a loan modification constitutes the unauthorized practice of law." 404 S.C. at 41, 744 S.E.2d at 539. There, the "Petitions obtained loan modifications from

their respective lenders to *extend their loans' maturity dates and receive additional time to pay*—just as the case now before this Court. *Id.* (emphasis added).¹² The two issues before the South Carolina Supreme Court were: (1) whether lenders engage in the unauthorized practice of law by preparing and mailing loan modification documents to borrowers and recording the executed documents without the participation of a licensed attorney and (2) whether the Court should deem petitioners' mortgages void if the Court finds a loan modification completed without the involvement of a licensed attorney constitutes the unauthorized practice of law. *Id.* at 44, 744 S.E.2d at 541.

After reviewing the history of the unauthorized practice of law in South Carolina, the Supreme Court rejected the borrowers' argument that "loan modifications 'change the existing terms of the legal rights of the parties' by altering interest rates and repayment terms"—the same argument made by Appellant here—and rejected the conclusion that because they have "legal effect," the agreements must constitute the unauthorized practice of law." *Id.* at 46, 744 S.E.2d at 542. The South Carolina Supreme Court held:

A loan modification is an adjustment to an existing loan to accommodate borrowers who have defaulted. In contrast, refinancing is the issuance of an entirely new loan, often used by home owners to take advantage of lower interest rates. Thus, the same public policy that requires attorney supervision for home purchases and refinancing does not apply to loan modifications. *Requiring attorney supervision over a loan modification would create a cost to the consumer outweighed by the benefit.* Additionally, the existence of a robust regulatory regime and competent non-attorney professionals militates against extending the attorney supervision requirement to loan modifications.

¹² In this case, the Loan Modification Agreement at issue extended the maturity date of the loan and gave Appellant and Ms. Sprinkle additional time to pay. (Ex. G to Mem. in Supp. of Mot. for Sum. J.) Notably, the Loan Modification Agreement does not prevent Appellant and/or Ms. Sprinkle from paying the loan off at the same rate or faster. Appellant and/or Ms. Sprinkle does not have to pay a single dollar more in interest if they do not want to.

Thus, we hold that lenders do not engage in the unauthorized practice of law by preparing and mailing loan modifications to borrowers . . . without participation of a licensed attorney. Given our rejection of the allegations that Respondents practiced law without authorization, it is unnecessary to reach Petitioners' issue as to whether this Court should deem their mortgages void.

Id. at 47, 744 S.E.2d at 542 (emphasis added). The *Crawford* holding is directly in line with the undisputed facts before the lower court.

In 2011, Appellant and Ms. Sprinkle were in default on their payment obligations under the Note and Mortgage. As found by the Family Court in its August 9, 2012 order, Ms. Sprinkle suffered “financial difficulties” “which caused the delinquency in the mortgage payments,” but she “used her best efforts to cure this matter” through the loan modification. (Ex. K to Mem. in Supp. of Mot. for Sum. J. at p.3, ¶ 10.) Thus, as noted in *Crawford*, the Loan Modification Agreement served as a method to “accommodate” Ms. Sprinkle and give Ms. Sprinkle—and even Appellant, if he so chooses—more time to repay the debt. The Loan Modification Agreement does not prevent (nor does Appellant allege that it prevents) either borrower from repaying the debt on or before the original scheduled maturity date.

Appellant’s argument that *Crawford* should be distinguished because, in that case, the “plaintiffs’ entire case was predicated on escaping liability for their own actions” is an erroneous effort to recast the issues decided by the South Carolina Supreme Court. Appellant suggests that *Crawford* was decided in favor of the lenders because “plaintiffs knowingly executed loan modifications without attorneys, essentially waiving their right to an attorney’s presence.” (App.’s Initial Br. at p.33.) This is certainly a convenient use of rose-colored glasses. *Crawford* does not in any way address waiver of the right to an

attorney. Instead, the South Carolina Supreme Court made it very clear that its holding was based on differing public policy issues; namely, “the same public policy that requires attorney supervision for home purchases and refinancing does not apply to loan modifications.” *Crawford*, 404 S.C. at 47, 744 S.E.2d at 542. While the plaintiffs in *Crawford* were trying to escape liability for their own actions, the Court was not deciding whether it was fair or equitable to allow the plaintiffs to avoid the loan modifications. Instead, the Court decided whether their payment obligations could be declared void due to the fact that an attorney was not involved with the preparation and execution of the modification documents. Stated simply, *Crawford* is, in all relevant aspects, on all-fours with this case.

Appellant cannot rescind the Loan Modification Agreement due to the fact that an attorney did not supervise the preparation and execution of the modification documents. The lower court properly ruled in favor of Respondent and this Court should affirm.

CONCLUSION

Appellant’s appeal suffers from a multitude of insurmountable flaws: preservation issues, binding law of the case, and affirmance mandated by the two-issue rule. As the lower court properly held, Appellant cannot use the circuit court system to remedy his dissatisfaction with the outcome of his family court proceedings. As evidenced herein, the undisputed facts in the record fail to establish a genuine issue as to any *material* fact and Respondent was entitled to judgment as a matter of law on all claims. Appellant was not damaged by the conduct of Respondent and, even with the Loan Modification Agreement in place, can continue to repay his debt within 20-years. Therefore, this Court should affirm the lower court’s award of summary judgment in favor of Respondent.

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November 6, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2013-CP-26-02135

Appellate Case No. 2015-001233

CitiMortgage, Inc., Respondent,

v.

Mitchell D. Snider, Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley and Scarborough, LLP, attorneys for Respondent, CitiMortgage, Inc., do hereby certify that I have served all counsel in this action with a copy of Respondent's Initial Brief by mailing a copy of same by United States Mail, postage prepaid to the following addresses:

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November 6, 2015