THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Case No. 2011-CP-08-1754

CitiMortgage, Inc., ... Respondent,

v.

Angela Drexler, ... Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal involves nothing more than continued procedural gamesmanship by Appellant Angela Drexler ("Appellant") to waste judicial resources, pursue inherently inequitable actions, and seek out claims that are unquestionably barred by the doctrines of *res judicata* and collateral estoppel. Rather than accepting the consequences of her dilatory conduct in a prior legal action that occurred in 2008, Appellant seeks yet another bite of the proverbial apple. While Respondent CitiMortgage, Inc. ("CitiMortgage") maintains its position that the notice of appeal was untimely[1] and, therefore, this Court lacks jurisdiction over this matter, it will also address Appellant's arguments below, following an outline of the facts and procedural history relevant to this appeal.

A. Prior Foreclosure Action – 2008.

The facts relevant to this appeal date back four years ago to May 7, 2008, when CitiMortgage[2] filed a Complaint for Foreclosure against Appellant, followed by an Amended Complaint for Foreclosure on May 21, 2008 in the Court of Common Pleas for Berkeley County, due to Appellant's failure to comply with her payment obligations on the Note.[3] (*See* Resp't Mem. in Supp. of Mot. to Dismiss; *see also* Compl. ¶¶ 21–22.) After Appellant was properly served[4] in that action, she failed to file an Answer and Counterclaim or otherwise appear, and an Order of Default was issued against her. (Compl. ¶ 22; *see also* J. of Foreclosure & Sale.) When the final foreclosure hearing was

[1]The untimeliness of the appeal was fully outlined in CitiMortgage's Motion to Dismiss Appeal and Reply in Support of Motion to Dismiss Appeal filed on March 24, 2012 and June 22, 2012, respectively, and the arguments therein are incorporated here by reference. However, this issue will also be briefly outlined in the Argument section below as requested by the Court's Order dated July 16, 2012.

[2]CitiMortgage was the servicer of Appellant's loan, the holder of the Note, and the assignee of the Mortgage at the time of the foreclosure action. (*See* J. of Foreclosure & Sale at ¶¶ 9–11.)

[3]The documents filed in civil action number 2008-CP-08-1258 are matters of public record.

[4]Appellant admitted during the trial court hearing that she was served and knew she was properly served. (Hr'g Tr. 9:6–7 ("She was served. She knew she was sued.")).

scheduled for October 29, 2008, Appellant was notified of the same. (*See* R. of Hr'g, Ex. A to Resp't Mem. in Support of Mot. to Dismiss.) While given a second opportunity to appear in the action, Appellant disregarded this opportunity and a Judgment of Foreclosure & Sale was entered against her on October 29, 2008. (*See* J. of Foreclosure & Sale, Ex. B to Resp't Mot. to Dismiss.) At that time, the Master in Equity ("Master") determined that CitiMortgage did have standing to foreclose, Appellant failed to satisfy her payment obligations under the Note, and the property was to be sold at public auction. A notice of sale was mailed to Appellant on that same date, indicating a public auction date of December 3, 2008. (*See* Notice of Sale, Ex. B to Resp't Mem. in Support of Mot. to Dismiss.) On December 3, 2008, the property was sold to Stonegate Properties ("Stonegate"), a defendant in the trial court action below.

B. Appellant's Rule 60(b) Motion in Foreclosure Action.

After the property was sold, Appellant hired an attorney and filed a Motion to Vacate Judgment of Foreclosure and Master's Sale pursuant to Rule 60(b), SCRCP ("Motion to Vacate" or "Rule 60(b) Motion") on February 19, 2009. (*See* Ex. D to Resp't Mot. to Dismiss.) In support of her Motion to Vacate, Appellant submitted an affidavit and several exhibits, including copies of mailing receipts. (*See id.*) A hearing was scheduled before the Honorable Robert E. Watson, Master in Equity, on March 18, 2009. At that time "[t]estimony was taken from [Appellant] at some length." (6/8/09 Order, Ex. E to Resp't Mot. to Dismiss.) The Master noted that both parties were "remarkably well prepared and presented zealous and compelling arguments." (*Id.* at p.1) In addition to testifying, Appellant was given the opportunity to "enter[] a number of exhibits," "including copies of various bank statements, [and] copies of receipts for

mailing." (*Id.* at p.2) During that hearing, Appellant took the same position she is taking in this case, that CitiMortgage did not properly apply her payments (allegedly improper servicing) and that her mortgage was, in fact, reinstated. The Master reviewed the testimony and evidence presented and held: (1) Appellant's "testimony—that the payments she made would reinstate her mortgage—are **not supported by the record**" and (2) the "record demonstrates that [Appellant] **defaulted** and did **not timely reinstate**." (*Id.* at pp. 2, 4 (emphasis added).) Further, he ruled that the "facts and law [were] overwhelmingly against [Appellant]," and denied the Rule 60(b) Motion. (*Id.* at p.6.) Because this was a final ruling, Appellant had thirty days to serve a notice of appeal pursuant to South Carolina Appellate Court Rule 203(b)(1), but failed to do so. (*See* Order Granting Summ. J. at p.8 n.2; *see also* App.'s Initial Br. at p.9 ("Appellant did not appeal the Court's decision.")

On August 4, 2009, a hearing on surplus funds was held and Appellant was awarded $1,103.76. At that time, the Master ordered the "case ended and the file closed." (*See* Order of Disbursement, Ex. D to Resp't Mem. in Supp. of Mot. to Dismiss.) Because Appellant defaulted in the foreclosure action, thereby waiving her affirmative defenses and barring any compulsory counterclaims, and because she litigated the alleged improper servicing issues through the unappealed Rule 60(b) Motion, Appellant exhausted her avenues of relief. Although this matter should have ended there, Appellant attempted to pursue it further by initiating a new action, years later.

C. Independent Trial Court Action – 2011.

Two years after the Master's ruling on the Rule 60(b) Motion, Appellant instituted the instant action, which is the subject of this appeal, by filing a Complaint

against CitiMortgage, BB&T, and Stonegate on June 21, 2011. (*See generally* Compl.) Appellant again sought to set aside the Master's Sale, void the Master's deed, cancel the mortgage assignment, set aside the Judgment of Foreclosure and Sale,[5] and recover damages against CitiMortgage under theories of negligence, fraud, breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, slander of title, negligent misrepresentation, tortious interference with contract, and alleged violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). All of Appellant's claims for damages outline factual allegations related to the servicing of her loan, i.e., application of payments and alleged reinstatement. Because these claims were clearly barred by the doctrines of res judicata and collateral estoppel—as compulsory counterclaims, affirmative defenses, or stemming from issues actually ruled upon by the Master during the Rule 60(b) Motion—CitiMortgage filed a Motion to Dismiss the Complaint pursuant to Rule 12(b), SCRCP on August 25, 2011.

In CitiMortgage's Motion to Dismiss and supporting Memorandum, it argued that each of Appellant's claims were either compulsory counterclaims or affirmative defenses that should have been asserted in the prior foreclosure action and Appellant's failure to assert them in that action resulted in res judicata in the later-filed action. Moreover, CitiMortgage argued that underlying issues, such as improper application of payments, alleged reinstatement of the loan, and CitiMortgage's standing to foreclose, were barred

[5]For purposes of this appeal, Appellant only addresses her negligence, fraud, breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, slander of title, negligent misrepresentation, tortious interference with contract, and alleged violation of the SCUTPA. (*See* Appellant's Initial Br. at p.9.) Appellant does not address the causes of action to set aside the Master's sale (Compl. ¶¶ 54–57), cancel the Master's deed upon sale (*Id.* at ¶¶ 58–60), void or cancel assignment of mortgage (*Id.* ¶¶ 61–63), and wrongful foreclosure via lack of standing (*Id.* at ¶¶ 64–57) and, therefore, any rulings related to these arguments have become the law of the case. *See, e.g., First Union Nat'l Bank v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

by collateral estoppel since the Master already heard testimony, considered evidence, and made a ruling on these issues and Appellant failed to appeal. Similarly, to the extent Appellant sought declarations related to a "wrongful" foreclosure, cancellation of the Master's deed, and vacation of the judgment and subsequent sale, CitiMortgage argued that Appellant improperly attempted to relitigate the Judgment of Foreclosure and Sale in an independent action when the proper mechanism was through the appellate process. Finally, CitiMortgage argued that the negligence and negligent misrepresentation claims failed pursuant to the economic loss doctrine and Appellant lacked standing to challenge the mortgage assignment. Appellant submitted her Memorandum in Opposition to Motion to Dismiss at the hearing before The Honorable Roger M. Young ("Judge Young") on October 12, 2011.

After reading the briefing submitted by the parties and hearing the arguments presented at the hearing, Judge Young treated the Motion to Dismiss as a Motion for Summary Judgment and ruled in favor of CitiMortgage. Judge Young initially took the matter under advisement, but noted at the hearing that because Appellant admittedly raised all of the issues at the Rule 60(b) stage and did not appeal, the claims were barred:

> Mr. Hamrick: She did not defend herself because they told her you would not need to do that as long as you follow our instructions, send us these checks, send us the faxes, send us the certified checks, which she did.
>
> The Court: Did you tell all this to Judge Watson at the 60(b) motion?
>
> Mr. Hamrick: **They did, Your Honor**.
>
> The Court: And so why am I hearing this today? You didn't appeal. It's final judgment. All of these are barred by res judicata and collateral estoppel.

(Hr'g Tr. 10:3–12 (emphasis added).)

> The Court: [Referring to Appellant's argument that payments were made] Why didn't she tell the judge about that during the Rule 60 motion?
>
> Mr. Hamrick: **She did, Your Honor**.
>
> The Court: Well, the judge has ruled on it.
>
> Mr. Hamrick: **I understand**.
>
> The Court: Well, I understand too, and that is called res judicata. A judge has already ruled on the exact same facts, exact same issues of law. I don't get – I'm not an appellate Court. I don't set and redo what he has to say. If you didn't like that, they should have appealed.

(*Id.* at 11:17–12:2 (emphasis added).)

> The Court: The judge heard these arguments about whether or not she would have made payments and it should have been set aside two years ago, and that's a final order after 30 days.
>
> Mr. Hamrick: Yes, Your Honor.

(*Id.* at 12:15–19.)

Judge Young's clerk notified the parties on November 21, 2011, that he was ruling in favor of CitiMortgage and asked counsel for CitiMortgage to prepare a proposed order. (*See* 11/21/11 E-mail from Ms. Ramsay.) After receiving notice of Judge Young's ruling, Appellant filed a Motion to Amend Complaint on December 8, 2011 to add Mass Mutual Life Insurance Company ("Mass Mutual") as a party to the litigation. (*See* Mot. to Amend Compl.) On that same date, counsel for Appellant sent an e-mail to Judge Young's clerk asking that he defer signing an Order dismissing CitiMortgage until after a hearing could be scheduled on the Motion to Amend Complaint. (*See* 12/8/11 E-mail from Attorney Hamrick.) On January 9, 2012, Judge Young's law clerk informed

the parties that Judge Young was signing the Order Granting Summary Judgment in favor of CitiMortgage and that a hearing would need to be scheduled with the Clerk of Court's office for Appellant's pending Motion to Amend Complaint. (*See* 1/5/12 E-mail from Ms. Ramsay.) Subsequently, the Order Granting Summary Judgment was entered on January 6, 2012. (*See* 1/6/12 Order Granting Summ. J.)

D. Motion to Reconsider, Improper Joinder of a Party, Untimely Appeal.

After filing the Motion to Amend Complaint, and in an ineffective attempt to toll the time for appeal, Appellant filed a Motion to Reconsider, Alter or Amend the Order Granting Summary Judgment in favor of CitiMortgage on January 17, 2012, pursuant to Rule 59(e), SCRCP ("Motion to Reconsider"). (*See* Mot. to Reconsider, Alter or Amend.) Rather than pursuing either the Motion to Amend Complaint or the Motion to Reconsider, Appellant's counsel admittedly took improper action by submitting a motion cover sheet and Consent Order for Joinder of an Additional Defendant[6] to The Honorable Deadra L. Jefferson, pursuant to Rules 15 and 19, SCRCP, without CitiMortgage's consent. (*See* Consent Order for Joinder; *see also* App.'s Initial Br. at p.10 ("Appellant's attorneys improperly submitted a Consent Order amending the complaint and joining MassMutual.")). Appellant represented through the Consent Order for Joinder that CitiMortgage was "dismissed from the action by Judge Roger Young's Order of January 6, 2012, [was] no longer a party to the action and therefore [its] consent [was] no longer required for Joinder." (*See id.* at ¶ 4.) Appellant further represented that the contents of

[6]In her Initial Brief, Appellant states that Mass Mutual's "identity as note holder had recently been ascertained." This is a patently incorrect statement. Mass Mutual was not the note holder; it was the *investor*. CitiMortgage was the note holder, as the Master held in the Judgment of Foreclosure & Sale, which Appellant never appealed. While Appellant attempts to skew factual assertions in her favor throughout her Initial Brief, there is absolutely no evidentiary or record support for her statement that Mass Mutual was the note holder at the time the foreclosure action was commenced.

the order and the Amended Complaint had "no force or effect upon the Order granting Summary Judgment and Dismissing Defendant CitiMortgage, Inc." (*Id.* at ¶ 10.) Thus, as argued in CitiMortgage's Motion to Dismiss Appeal, Appellant avoided a hearing on the Motion to Amend and sidestepped obtaining CitiMortgage's consent to amend the Complaint to add an additional party.

Without a hearing, but following CitiMortgage's submission of a Memorandum in Opposition to Motion to Reconsider, Judge Young ruled on March 6, 2012, that in representing to the trial court that CitiMortgage was dismissed from the action, Appellant also necessarily withdrew her Motion to Reconsider. (*See* Mem. in Opp'n to Mot. to Reconsider; *see also* Order Denying Mot. to Reconsider.) Based on the foregoing, on May 24, 2012 CitiMortgage filed a Motion to Dismiss Appellant's notice of appeal served on April 4, 2012. (*See* Mot. to Dismiss Appeal; Reply in Supp. of Mot. to Dismiss Appeal.) This Court issued an Order, dated July 16, 2012, denying the motion, but requesting that the parties address the issue of timeliness in their initial briefs.

Based on the foregoing, not only does Appellant lose on the merits of this appeal because her claims are barred by res judicata and collateral estoppel, just as Judge Young ruled in this case, the actions of Appellant following the filing of the Motion to Reconsider resulted in the notice of appeal being untimely. Therefore, CitiMortgage respectfully requests dismissal of the appeal or, in the alternative, an Order affirming the trial court's grant of summary judgment in its favor.

ARGUMENTS

As succinctly stated by Judge Young, even after reading Appellant's Initial Brief, "I'm missing how res judicata isn't ***designed, exactly, for this situation***." (Hr'g Tr.

13:1–3 (emphasis added).) Allowing Appellant to proceed on her claims that are so clearly barred by res judicata and collateral estoppel would result in a subterfuge of the South Carolina Rules of Civil Procedure and the jurisprudence of this State, resulting in Appellant obtaining yet another bite of the apple—another bite that is entirely undeserving. Appellant's recourse, when the Master did not rule in her favor on the Rule 60(b) Motion, was to file a motion to reconsider or to appeal that ruling. (*Id.* at 18:6–11) (noting that the "proper motion was a motion to reconsider" and "depending on how they would have ruled on that [she] could have appealed").) She did neither. Accordingly, it is through Appellant's own actions that her claims in the instant lawsuit are precluded. As outlined below, none of Appellant's arguments change this result.

I. AS A THRESHOLD ISSUE, APPELLANT'S APPEAL IS UNTIMELY.

As explained in Respondent's Motion to Dismiss Appeal and Reply in Support of Motion to Dismiss Appeal, the Court of Appeals lacks jurisdiction because Appellant failed to timely serve her notice of appeal after withdrawing her Motion to Reconsider filed in the lower court. When a notice of appeal is not timely filed by an appellant, the Court of Appeals lacks jurisdiction to hear the appeal. *See Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999) ("Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days . . . and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal."); *see also* S.C. R. Civ. P. 203(b)(1). While Rule 203(b)(1) allows the filing of a timely post-trial motion to toll the thirty-day time limit to serve the notice of appeal, Appellant's Rule 59(e) motion fails to satisfy that requirement because it was withdrawn by virtue of Appellant's representations to the lower court in a subsequent submission. Once Appellant withdrew

the Motion to Reconsider, the time for appeal began running.[7] Therefore, Appellant's April 4, 2012 notice is untimely and should be dismissed due to lack of jurisdiction.

As briefly outlined above, Appellant filed a Motion to Reconsider on January 17, 2012, seeking reconsideration of Judge Young's Order granting summary judgment in favor of CitiMortgage. Just eight days later, on January 25, 2012, Appellant submitted a Consent Order for Joinder to Judge Jefferson, but did not obtain CitiMortgage's consent to the joinder of an additional party. (*See generally*, Consent Order for Joinder.) In the Consent Order, Appellant represented that CitiMortgage was "dismissed from the action," was "no longer a party to the action," and "[its] consent [was] no longer required for Joinder." (*See id.* at ¶ 4.) As argued in CitiMortgage's Motion to Dismiss Appeal, with the improper Consent Order, Appellant avoided a hearing on the Motion to Amend Complaint and sidestepped obtaining CitiMortgage's consent to add an additional party.

As a result of Appellant's representation regarding CitiMortgage's dismissal from the case as of January 6, 2012, the Court must conclude that Appellant's Motion to Reconsider stopped tolling the time for serving a notice of appeal in this case. At that point in time, the Motion to Reconsider necessarily became moot. Appellant's actions and representations to the lower court related to the Consent Order for Joinder

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[7]Although the South Carolina Supreme Court has not previously had occasion to consider whether a voluntarily withdrawn Rule 59(e) motion tolls the time in which a party must appeal, it has held in analogous situations that an ineffectual Rule 59(e) motion does not toll the time to appeal. *See, e.g.*, *Robinson v. Robinson*, 365 S.C. 583, 586, 619 S.E.2d 425, 426 (2005) (holding that an inappropriate post-trial motion does not toll the time for appeal); *Quality Trailer Prods., Inc. v. CSL Equip. Co., Inc.*, 349 S.C. 216, 219, 562 S.E.2d 615, 617 (2002) (holding that the filing of successive post-trial motions raising issues already raised to and ruled upon by the trial court does not toll the time to serve a notice of appeal). This same reasoning applies here. Appellant's Motion to Reconsider became "inappropriate" once she represented to the lower court in the subsequently filed Consent Order for Joinder that CitiMortgage was no longer a party to the litigation and its consent was not necessary. Similarly, other courts have held that a withdrawn Motion to Reconsider or other post-trial motion does not toll the time for appeal. *See, e.g.*, *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010) (holding appeal untimely where plaintiff voluntarily withdrew Rule 59 motion and thus the order being appealed from was the prior summary judgment ruling); *Copar Pumice Co. v. Morris*, 639 F.3d 1025 (10th Cir. 2011) (holding "a withdrawn motion is treated as though the motion had never been made for purposes of the [tolling rule]").

acknowledge that she wanted Judge Jefferson to believe that the January 6, 2012 summary judgment Order was final, no motion to reconsider was pending, and only a potential appeal existed. Thus, Appellant materially benefitted from her assertion that CitiMortgage was no longer a party and obtained an advantage in adding a new defendant to the pending litigation without opposition, thereby necessitating a finding by Judge Young in his Order that the Motion to Reconsider was withdrawn through Appellant's subsequent conduct before Judge Jefferson.[8] (*See* Order Denying Mot. to Reconsider as Moot.) Further, by making such a representation in the Consent Order for Joinder, Appellant was judicially estopped from taking a contrary position later and pursuing the Motion to Reconsider. Due to these representations, Appellant's thirty-day period to appeal was not tolled and began running on January 6, 2012. To the extent the Court could find any tolling occurred in this case, the tolling period ended no later than January 25, 2012, when Appellant submitted the Consent Order for Joinder to Judge Jefferson. This action, again, necessarily resulted in Appellant withdrawing her Motion to Reconsider. In either instance, the thirty-day period outlined in Rule 203(b)(1) expired before Appellant served her Notice of Appeal.

In her Initial Brief, Appellant argues she was unaware that her Motion to Reconsider was withdrawn until Judge Young's Order was issued on March 6, 2012. This assertion is, at best, disingenuous and, in reality, entirely incorrect. Following

[8] With the Motion to Reconsider pending, CitiMortgage should have been consulted regarding the request and its consent obtained for the joinder of an additional party, a point that Appellant concedes in her Initial Brief. (App.'s Initial Brief at p.40.) Because Appellant affirmatively represented to the lower court through her motion coversheet and proposed order that CitiMortgage was "no longer a party to the action," she necessarily and effectively must have withdrawn the Motion to Reconsider. Judge Young agreed with CitiMortgage's position, deeming Appellant's Motion to Reconsider moot. The lower court held that "Plaintiff effectively withdrew the Motion to Reconsider when she submitted the motion sheet and proposed Consent Order for Joinder to Judge Jefferson and acknowledged CitiMortgage was 'dismissed' from the case as of the January 6, 2012 Order." (*See* Order Den. Mot. to Reconsider as Moot at ¶ 7.)

Appellant's submission of the Consent Order for Joinder to Judge Jefferson, CitiMortgage made the lower court and Appellant aware of this event and its impact on the pending Motion to Reconsider when it served its Response in Opposition to Motion to Reconsider on February 6, 2012—one month before Judge Young issued his Order declaring the Motion to Reconsider moot. Moreover, Judge Young's clerk notified the parties on February 16, 2012, that Judge Young was ruling in favor of CitiMortgage based on the "issues outlined in [the] Memo in Opposition to the Motion to Reconsider." (*See* 2/16/12 Email from Ms. Ramsay.) Therefore, Appellant was notified and aware on at least two occasions in February 2012 that her Motion to Reconsider would be found to be withdrawn, not to mention that she should have understood the consequences of her actions when she submitted the Consent Order for Joinder to Judge Jefferson stating CitiMortgage was dismissed as of January 6, 2012.[9] In light of the arguments made by CitiMortgage in its opposition to the Motion to Reconsider regarding the impropriety of Appellant's conduct in submitting the Consent Order for Joinder to Judge Jefferson without consulting with CitiMortgage, Appellant could have and should have filed her Notice of Appeal at that time. Again, Appellant refuses to accept the consequences of her actions—a theme permeating throughout this protracted litigation.

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[9] Appellant curiously asserts in her Initial Brief that the Consent Order for Joinder contemplates bringing CitiMortgage back into the litigation as part of her effort to explain that she did not represent to the lower court that CitiMortgage was dismissed from the case on January 6, 2012. However, in the Consent Order for Joinder submitted to the lower court, Appellant specifically stated that CitiMortgage was "dismissed from the action by Judge Roger Young's Order of January 6, 2012, [and] is no longer a party to the action." (*See* Consent Order for Joinder at ¶ 4.) More importantly, there is no indication in the record that Appellant notified Judge Jefferson that a Motion to Reconsider regarding CitiMortgage was pending when she submitted the proposed Consent Order for Joinder. At most, Appellant's proposed Consent Order contemplates that she would serve a ***timely*** notice of appeal—running from the January 6, 2012 date of entry of the Order. Further, even if this Court finds that the Motion to Reconsider was tolled until the submission of the Consent Order for Joinder on January 25, 2012, Appellant would have had ***nine days*** following the February 16, 2012, email from Judge Young's clerk to timely serve her Notice of Appeal and comply with the language of her Consent Order for Joinder on which she now relies.

Furthermore, Appellant's conduct is in direct conflict with the principle of judicial estoppel. Judicial estoppel prevents a party from taking a contrary position that is inconsistent with one previously asserted in the same proceeding—a doctrine intended to protect the integrity of the judicial process. *See Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). In the Order Denying Appellant's Motion to Reconsider as Moot, Judge Young found that Appellant was "judicially estopped from proceeding on the Motion to Reconsider based on her affirmative representations to Judge Jefferson . . . that Defendant is no longer a party to the action." (*See* Order Den. Mot. to Reconsider as Moot at ¶ 12.) Appellant is bound by the actions of her attorney,[10] and the consequence of those actions was outlined by Judge Young. He held as follows:

> By failing to acknowledge in the Consent Order for Joinder that she had a Motion to Reconsider pending before this Court and failing to seek the consent of Defendant, Plaintiff necessarily admits that this Court's January 6, 2012 Order granting summary judgment in favor of Defendant was final, at that time. On that basis, Defendant is no longer a party to the litigation. Accordingly, the Court finds that, based on Plaintiff's own representations to Judge Jefferson, the Order granting summary judgment in favor of Defendant is final as of January 6, 2012, and the Motion to Reconsider is ***necessarily withdrawn***.

(*See id.* at ¶ 10 (emphasis added)).

Further, while noting that Appellant was judicially estopped from proceeding with the Motion to Reconsider, Judge Young held that "Plaintiff elected to effectively withdraw her Motion to Reconsider so that she could submit a Consent Order for Joinder, joining Defendant Mass Mutual as a party to the action, without seeking or receiving the

[10] It is well-established that a client is bound by the actions and representations of her attorney in litigation. *See Koutsogiannis v. BB&T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428–29 (2005) (finding the submission of a proposed summary judgment order to the trial court an act within the scope of representation and noting that "clients are generally bound by their attorneys' acts or omissions during the legal representation").

consent of Defendant." (*See id.* at ¶ 15.) Thus, the actions of Appellant resulted in the Motion to Reconsider being withdrawn as of January 25, 2012, at the latest, despite Appellant's assertions now to the contrary as part of her effort to salvage her appeal. As a result, Appellant failed to perfect a timely appeal from the Order Granting Summary Judgment in favor of CitiMortgage, the Court is without jurisdiction over the appeal, and Appellant's putative grounds for her appeal need not be considered by the Court.

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

In Appellant's Initial Brief, she presents eleven issues for appeal, six of which have not been preserved. (*See* App.'s Initial Br. at pp.5–6.) Specifically, issues 1, 4, 5, 6, 7, 9, and 10 are not preserved for appellate review because the lower court did not rule on these issues in its Order granting summary judgment and the issues were not included in Appellant's Motion to Reconsider. (*See id.* ("Statement of Issues on Appeal"); *see also* Order Granting Summ. J.; Mot. to Reconsider, Alter or Amend.) Therefore, having not been preserved for appellate review, they cannot be considered by this Court and 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). Accordingly, the litigant must specifically raise the issue <u>and</u> 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 Rule 59 motion, which requests 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 the explicit rules renders the issue not preserved for appeal.

In this matter, the Order granting summary judgment in favor of CitiMortgage did not address Issues 1, 4, 5, 6, 7, 9 and 10. Moreover, while Appellant filed a Motion to Reconsider, it was very limited in scope and did not request a ruling on any of the above-listed issues. Accordingly, these issues 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 issues that are not preserved, they similarly fail on the merits as outlined, at length, below.

III. RES JUDICATA WAS PROPERLY RAISED IN CITIMORTGAGE'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6), SCRCP AND AN ANSWER WAS NOT NECESSARY.

Appellant argues that reversal is proper because an answer asserting res judicata as an affirmative defense was not filed prior to CitiMortgage's motion to dismiss Appellant's claims. This argument is patently incorrect and conflicts with the plain language of Rule 12, SCRCP.

A. Rule 12, SCRCP Allows a Motion Prior to an Answer in this Context.

First, pursuant to the plain language of the South Carolina Rules of Civil Procedure, CitiMortgage was not required to file an answer prior to serving its motion to dismiss on <u>all claims</u>. Rule 12(a), SCRCP outlines the standard thirty day deadline for a defendant to serve an answer to a complaint. However, Rule 12(a) also provides that

"service of a motion permitted under this rule ***alters these periods of time***" to "15 days after notice of the Court's action," if the "Court denies the motion or postpones its disposition until a trial on the merits." S.C. R. Civ. P. 12(a) (emphasis added. This extension of time to answer is read in conjunction with Rule 12(b), SCRCP, which provides as follows:

> Every defense, in law or in fact, to a cause of action in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following ***defenses*** [including Rule 12(b)(6)] ***may at the option of the pleader be made <u>by motion</u>***.

S.C. R. Civ. P. 12(b) (emphasis added). "A motion making any of these defenses shall be made ***before pleading*** if a further pleading is permitted." *Id.* (emphasis added). In this case, further pleading is expressly permitted by Rule 12(a), SCRCP, if CitiMortgage was unsuccessful on its motion. Therefore, under the plain language of the South Carolina rules, CitiMortgage's Motion to Dismiss prior to serving an answer was proper.

B. Applicability of Res Judicata is Clear on the Face of the Complaint.

Moreover, to the extent Appellant argues that the affirmative defense of res judicata was not clear on the face of the Complaint, this proposition is also erroneous. *See Liberty Mut. Ins. Co. v. Empl. Ins. Of Wausau*, 284 S.C. 234, 237, 325 S.E.2d 566, 568 (Ct. App. 1985) ("As a general rule, the defense of preclusion . . . must be raised by answer or reply. Where, however, the facts of the prior adjudication appear on the face of the complaint or counterclaim, the defense can be raised by demurrer."). Appellant concedes that the Complaint "discloses the fact that a prior suit involved the same parties," but argues her allegation that CitiMortgage operated in a representative capacity somehow precludes res judicata as a basis for dismissal. (*See* App.'s Initial Br. at pp.11–

12.)[11] Specifically, Appellant makes the tenuous argument that while "the prior suit is ***evident on the face of the complaint***," the trial court should not have ruled on this issue because she argued that CitiMortgage "acted in a different capacity in the prior suit." (*Id.* at p.12 (emphasis added).) This argument is incorrect for numerous reasons.

First, neither the law[12] nor logic requires that the Complaint establish each and every element of the doctrine of res judicata. As outlined in South Carolina case law, it is only necessary that the facts of the prior adjudication appear in the complaint. *See Liberty Mutual*, 284 S.C. at 237, 325 S.E.2d at 568. So long as the Complaint acknowledges the existence of a prior suit between the parties, it is then the defendant's role to support and prove the elements of res judicata. *See Stone v. Roadway Express, Emp'r*, 367 S.C. 575, 580, 627 S.E.2d 695, 697–98 (2006) (noting when res judicata applies). Here, all of the elements of res judicata are met. In the Complaint, Appellant admitted there was a final judgment on the merits. (*See* Compl. ¶ 38.) The named plaintiff in the foreclosure action was CitiMortgage, the same entity named in this action. And, as outlined below, Appellant was required to assert her claims as compulsory counterclaims in that prior suit. Accordingly, in light of Appellant's concessions and the authority cited above, it was proper for CitiMortgage to argue res judicata and for the

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[11]Appellant also fails to recognize that not only are all of the documents submitted in the prior foreclosure action a part of the public record and, therefore, proper for consideration at the Rule 12(b)(6) stage, she relies on the prior foreclosure proceeding to support her claims. *See, e.g., Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009) (noting that a party cannot survive a motion to dismiss "by intentionally omitting documents upon which their claims are based").

[12]Appellant fails to cite any case law support for her argument that all of the elements of res judicata must appear on the face of the pleading. *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.").

lower judge to rule on that basis. Second, Appellant is factually wrong in that the Complaint is rife with references to CitiMortgage's role as the foreclosing party in the original action. (*See* Compl. ¶¶ 46, 50, 55–57, 59, 62, 81, 97.) In fact, one of the causes of action in Appellant's Complaint asserted ***against CitiMortgage alone***[13] is for wrongful foreclosure via standing. (*Id.* at ¶¶ 64–68; App.'s Initial Br. at p.7 ("Respondent served Appellant a foreclosure suit.")). To now argue that the operative Complaint somehow portrays CitiMortgage as a nominal party in the prior suit is incorrect and insincere.

Finally, the fact alleged by Appellant, that CitiMortgage was acting in a "representative capacity" in the prior suit,[14] even assuming this is evident from the Complaint, does not operate to preclude the applicability of res judicata. *See Pye v. Aycock*, 325 S.C. 426, 437, 480 S.E.2d 455, 460 (Ct. App. 1997) ("It is apodictic that the doctrine of res judicata has been elongated to included 'privies.'"). As outlined in the well-established case law on this issue, the doctrine of res judicata undoubtedly applies to parties ***and their privies***. *See, e.g., Antrum v. Hartsville Prod. Ass'n*, 228 S.C. 201, 209, 89 S.E.2d 376 (1955) (noting that the principle of res judicata rests upon "public policy that after final decision of a controversy by a court of competent jurisdiction the party against whom the decision was rendered, and those in privity with him, should not be permitted again to litigate"); *Morrow v. Atlanta & C.A.L.R. Co.*, 84 S.C. 224, 244, 66 S.E. 186 (1909) (noting where there is evidence of privity, "it shows that there is such privity that the judgment rendered upon the same cause of action is res judicata and conclusive"). Accordingly, representative capacity is irrelevant.

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[13]There are additional defendants in the trial court action, including BB&T and Stonegate, the purchaser of the property at the foreclosure sale.

[14] CitiMortgage notes that it was the named plaintiff in the foreclosure action and is now a named defendant in the trial court action. Identity of the parties is evident.

Generally, parties are in privity for purposes of a judgment or decree when the privy's "interest has been legally represented." *See First Nat'l Bank v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 27, 35 S.E. 2d 47, 58 (1945). Privity also means "mutual or successive relationship to the same rights of property." *Wyndham v. Lewis*, 292 S.C. 6, 8, 354 S.E.2d 578, 579 (Ct. App. 1987) (citing *Rabil v. Farris*, 213 N.C. 414, 196 S.E.321 (1938)). Here, Appellant argues that Mass Mutual held the note related to the loan that CitiMortgage serviced. (App.'s Initial Br. at p.6.) While CitiMortgage notes that Appellant misstates the relationship between Mass Mutual and CitiMortgage because this involves a relationship between investor and servicer, on the face of Appellant's allegations there is privity between the entities. *See, e.g., Coleman v. Countrywide Home Loans, Inc.*, No. L-10-2297, 2010 U.S. Dist. LEXIS 127711, at *10 (D. Md. Dec. 3, 2010) ("In essence, [Plaintiff's] Complaint is itself rooted in the premise that the Defendants in the instant action are the same as the parties to the foreclosure action or in privity with them."). Moreover, several courts have found that the relationship between an investor and servicer is one of privity for purposes of res judicata. *See, e.g., El Veasta Lampley v. Deutsche Nat'l Trust Co.*, No. 09-367, 2009 U.S. Dist. LEXIS 49547, at *9 (C.D. Cal. June 12, 2009) (listing various lenders, servicers, and investors and noting that "[e]ach of the named defendants is certainly the 'virtual representative' of the others" for purposes of res judicata privity); *Luciano v. WMC Mortg. Corp.*, No. 1 CA-CV 08-0566, 2010 Ariz. App. LEXIS 73, at *15 (Ariz. Ct. App. Apr. 13, 2010) (finding summary judgment proper where "JPMC is the assignee of the beneficial interest. . . and thus stands in WMC's shoes" and "SPS is the contractual servicer of the note acting as WMC's authorized agent;" these "relationships are sufficient" to establish privity);

Stewart v. Deutsche Bank Nat'l Trust Co., No. 3:08-CV-475, 2010 U.S. Dist. LEXIS 108774, at *16 (E.D. Tenn. Oct. 12, 2010); *Anderson v. Bank of Am.*, No. 2:09-cv-183, 2009 U.S. Dist. LEXIS 104288, at *4 (S.D. Miss. Nov. 3, 2009). Based on the foregoing, the trial court's consideration of CitiMortgage's Motion to Dismiss prior to the filing of an Answer does not serve as a ground for reversal.

IV. APPELLANT WAS GIVEN AN OPPORTUNITY TO SUBMIT DOCUMENTS PRIOR TO CONVERSION TO SUMMARY JUDGMENT; DISCOVERY WAS NOT NECESSARY.

Despite Appellant's pleas to the contrary, Appellant had sufficient notice and opportunity to supplement her arguments, if she deemed necessary, prior to and in conjunction with the conversion to summary judgment. Appellant's failure to heed this opportunity is not attributable to an error by the trial court. Moreover, to the extent Appellant claims the record needed to be developed through discovery, this position is not supported by the facts or case law relevant to this matter.

A. Appellant was given an opportunity to present material to the trial court and the cases cited by Appellant are distinguishable.

Initially, it appears Appellant takes issue with the trial court's decision to convert the Motion to Dismiss into one for summary judgment. (*See* App.'s Initial Br. at p.13 ("Rather than denying the motion, the Trial Court instead converted the motion to one for summary judgment *sua sponte*."). However, much to Appellant's dismay, it is entirely proper for a trial court to treat a Rule 12(b)(6) motion to dismiss as a motion for summary judgment. *See* S.C. R. Civ. P. 12(b); *see also Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 328, 574 S.E.2d 502, 506 (Ct. App. 2002) (affirming grant of summary judgment where "[i]n deciding [defendant's] motions to dismiss, the circuit court considered matters outside the pleadings" and "the circuit court implicitly converted the motions to

dismiss into summary judgment motions"). In converting the motion to dismiss into one for summary judgment, the lower court need only provide a "reasonable opportunity [for the parties] to present all material made pertinent to such motion by Rule 56." *Pitts*, 352 S.C. at 328, 574 S.E.2d at 506. Here, Appellant fails to identify any additional material that she allegedly needed to submit for purposes of summary judgment. Instead, she makes a blanket and erroneous assertion that the trial court's "failure to afford this opportunity [to submit affidavits or additional evidence] is reversible error under the pertinent case law." (App.'s Initial Br. at p.13.) As discussed below, the "pertinent case law" cited by Appellant does not support her proposition.

i. Appellant was on notice of the conversion to summary judgment pursuant to applicable case law.

Noticeably absent[15] from Appellant's Initial Brief is discussion of a case from the South Carolina Supreme Court addressing a strikingly similar scenario. *See Johnson v. Dailey*, 318 S.C. 318, 457 S.E.2d 613 (1995) (holding plaintiff had sufficient notice and opportunity to supplement her arguments and it was not error for the trial court to grant summary judgment). In *Johnson,* the court sanctioned conversion of a Rule 12(b)(6) motion into a summary judgment motion where the non-movant did not receive express notice of such conversion prior to the hearing. In that case, the defendants attached materials outside the pleadings to their 12(b)(6) motion.[16] The trial court treated the Rule 12(b)(6) motion as one for summary judgment; the Supreme Court affirmed:

> [T]he outside materials . . . attached to the 12(b)(6) motion, gave notice to [the plaintiff]" and "the outside materials

[15]The *Johnson* case is cited by Appellant only as part of the quote to the *Harrell* case, but not discussed. As noted below, the *Harrell* case is distinguishable from the instant case.

[16] It is unclear from the *Johnson* opinion whether the documents attached were a matter of public record, as they were in this matter.

> were specifically referred to by [the movants], ***both in the motion and at the hearing***.

Id. at 321, 457 S.E.2d at 615 (emphasis added). This situation is no different. Therefore, the Supreme Court has held that a party, such as Appellant here, has sufficient notice when the materials are attached to the motion and are specifically referenced during the hearing. Here, as Appellant concedes in her Initial Brief, she was well aware that CitiMortgage included documents from the public record as attachments to its Motion to Dismiss. (*See* App.'s Initial Br. at p. 12; *see also* Resp. in Opp'n to Mot. to Dismiss.) Additionally, Appellant's counsel was present at the hearing on the Motion to Dismiss and argued those same matters of public record extensively during the trial court's hearing on this matter. (*See* Hr'g Tr. 5:5–6, 14:21–23, 18:1–5.) In fact, it is Appellant's counsel that notes for the trial court that certain documents are attached to CitiMortgage's Motion. (*See id.* at 17:21–18:5.) Thus, Appellant was provided with sufficient notice in this case pursuant to *Johnson*.

ii. Appellant's authority is easily distinguishable.

In addition to overlooking the South Carolina Supreme Court case most analogous to this matter, Appellant relies on authority that is easily distinguishable. First, Appellant's reliance on *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987) is misplaced. In *Brown*, the South Carolina Supreme Court reversed a trial court's ruling which relied on matters outside the pleadings without giving any notice to the parties. While a glance at this case appears to support Appellant's position, it is entirely distinguishable because Appellant, unlike the plaintiff in *Brown*, had notice of CitiMortgage's reliance on matters of public record and, in fact, discussed those matters at length during the hearing. Additionally, *Brown* represents the South Carolina Supreme

Court's first attempt to establish the requirements for converting a motion to dismiss into a motion for summary judgment. *Id.* at 367, 353 S.E.2d at 699 ("This Court has not previously had an opportunity to interpret this provision."). Clearly, the court has continued to refine and clarify the procedure for doing so, including *Johnson*, cited above, which is on all fours with the case at bar.

Second, Appellant relies on *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011). Again, this case does not support Appellant's argument. There, the trial court did not intentionally convert a Rule 12(b)(6) motion into a summary judgment motion, nor did the plaintiff have any notice and opportunity to supplement. In fact, the action that the South Carolina Supreme Court found problematic in *Harrell* involved the trial court acting of its ***own initiative to locate and rely on matters outside the pleadings.*** Because this was unknown until the court issued its ruling, neither party had notice or opportunity to respond. *Id.* at 559 n.4, 713 S.E.2d at 608 n.2 ("Because [plaintiff] was not afforded the opportunity to introduce evidence in response to that ***injected*** into the matter ***by the court***, we decline to find that this Rule 12(b)(6) motion was converted into a motion for summary judgment.") (emphasis added). In this case, Judge Young did not inject any documents into this matter for purposes of his ruling, making *Harrell* inapposite.

Remarkably, one case cited by Appellant actually supports CitiMortgage's position. In *Pitts*, this Court upheld a grant of summary judgment where the defendant's memorandum in support of its motion to dismiss contained materials outside the pleadings and the trial court implicitly converted the Rule 12(b)(6) motion into one for summary judgment. Accordingly, such conversion was proper where the plaintiff had

notice from the defendant's memorandum, and had months in which it neglected to supplement its arguments. *Id.* at 328–29, 574 S.E.2d at 506. There, just like here, Appellant was on notice of the documents attached and the potential for conversion to summary judgment.

Based on the foregoing, not only is Appellant's contention that "the Trial Court ***never addressed*** the ***issue of admission of material outside of the Complaint*** until the final order" incorrect, the case law cited by Appellant does not support reversal of the trial court's Order. (App.'s Initial Br. at p.15.) As noted above, the trial court ***specifically addressed*** this issue with Appellant's counsel at the hearing:

> The Court: Do you have a copy of Judge Watson's order on the Rule 60 motion?
>
> Mr. Hamrick: I do, Your Honor.
>
> The Court: Let me have a copy of that. It's not attached to your motion, is it?
>
> Mr. Hamrick: It's not. It's attached to Citi's motion.
>
> The Court: All right. ***If it's in the file, I'll look at take a look at that time***. I'll take it under advisement.
>
> . . .
>
> As a result, you know, there is no appeal taken from the order, and from what I understand, you know, you're telling me these same issues got raised before him. There is not probably a whole heck of a lot I can do for you, but ***I'll read through what I have here in the file*** and let you know what I decide.

(Hr'g Tr. 17:21–18:17 (emphasis added).) At the very least, at that moment, Appellant was well aware that the trial court was considering those documents attached to CitiMortgage's motion. Because the hearing occurred on October 12, 2011, and the

judge did not send his email outlining his ruling until November 21, 2011, with the proposed order due on December 9, 2012, Appellant had ample notice that Judge Young was considering the documents attached to CitiMortgage's Motion, and more than ample opportunity to submit any documentation she deemed necessary.

iii. Appellant's own actions defeat her arguments on appeal.

Appellant was readily aware of her ability to submit additional information to the trial court, as evidenced by her own actions following the hearing on the Motion to Dismiss. On October 13, 2011, Appellant submitted a supplement to her memorandum in opposition after hearing the arguments presented at the hearing. (*See* 10/13/11 E-mail and Supp. in Opp'n to Mot. to Dismiss.) To now claim that she did not have an opportunity to submit additional documentation, that remains unidentified, when she did, in fact, submit additional documentation to the trial court, is entirely disingenuous. Finally, rather than submitting the supposed additional, illusive documents or evidence that Appellant now apparently claims are so vitally important, Appellant waited until December 8, 2011 at 4:36 p.m.,[17] one day prior to the deadline for submission of the proposed order, to notify Judge Young that she was filing a Motion to Amend Complaint. At that time, Appellant claimed that if Judge Young signed the proposed order, the investor's interests could "potentially" be prejudiced. (*See* 12/8/11 E-mail from Attorney Hamrick to Ms. Ramsay.) Not only is this concept incorrect—as outlined in the privity discussion above—it evidences that Appellant was, again, fully aware of her ability to submit evidence, affidavits, or any other documents that she deemed relevant prior to Judge Young signing the Order. Therefore, Appellant's argument is in error and cannot serve as a ground for reversal.

[17]The same day on which CitiMortgage submitted its proposed order to Judge Young for his consideration.

Not only did Appellant have the opportunity to submit whatever documents, evidence, or other information she deemed relevant, she seized that opportunity and submitted information for Judge Young's consideration.

B. No additional discovery is needed because Appellant never identified any undiscovered facts that would impact this case.

In addition to arguing that she was not given an opportunity to present evidence, affidavits, or other undisclosed documents to the lower court prior to the Order granting summary judgment in favor of CitiMortgage, Appellant also argues that she was not given an opportunity to develop the record through discovery. Such development was not necessary, nor has Appellant identified any undiscovered facts that would impact the case or the lower court's ruling. Accordingly, this argument does not support reversal.[18]

i. No additional discovery is needed because Appellant has not identified any relevant facts that need to be discovered.

The Court should not vacate the lower court's decision and allow additional discovery here for one fundamental reason: There are no relevant facts that have not yet been disclosed, nor has Appellant identified any that need to be discovered. Courts are clear that summary judgment should not be avoided simply because the non-movant requests time for discovery. (*See* Hr'g Tr. 15:13–16, 16:20–24, 17:10–15 (requesting an opportunity to "develop the record")). Instead, the nonmovant must identify ***specific***

[18]At the hearing before the trial court, Appellant's counsel tacitly conceded that should the litigation proceed and discovery be performed, CitiMortgage would ultimately prevail on summary judgment. (*See* Hr'g Tr. 16:20–23 ("The record should be developed and, Your Honor, perhaps CitiMortgage will be able to make a summary judgment at some point and ***be dismissed that way***. . . .") (emphasis added)). Why the parties should have to proceed through costly and time intensive discovery for CitiMortgage to be dismissed anyway is inexplicable. Accordingly, dismissal of the action early in the litigation saved all parties time, expense, and was in line with the policy behind the doctrine of res judicata. *See Wright v. Marlboro Cnty. Sch. Dist.*, 317 S.C. 160, 163, 452 S.E.2d 12, 14 (Ct. App. 1994) ("The doctrine of res judicata originates from the principles that public interest requires an end to litigation and that no one should be sued twice for the same cause of action." (citing *Hayes v. Hayes*, 312 S.C. 141, 439 S.E.2d 305 (Ct.App.1993))).

facts that have not yet been discovered that bear on the dispositive issues. *See, e.g., Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 440 (2003) (affirming summary judgment because "further discovery was unlikely to create any genuine issue of material fact"); *Wieters v. Roper Hosp., Inc.*, 58 Fed. App'x 40, 44 (4th Cir. 2003) (affirming summary judgment because opposing counsel never explained how the additional requested discovery "will be useful in resisting summary judgment"). Appellant has not and cannot meet this "specific facts" standard.

Even when Appellant emailed Judge Young to request that he forego signing the proposed order, due to the identification of Mass Mutual as the investor at the time of the foreclosure, she failed to file any affidavit pursuant to Rule 56(f), SCRCP, to identify the relevant facts that remained to be obtained through discovery. At that time, Appellant was fully aware that Judge Young was converting the Motion to Dismiss into one for summary judgment, yet she merely stated that the name of "Mass Mutual" as the investor somehow impacted the fact that all of her claims against CitiMortgage were barred by res judicata and collateral estoppel. Then, when Appellant served her Motion to Reconsider on January 17, 2012, she failed again to submit a Rule 56(f) affidavit to support her contentions that additional discovery was needed. Not only does the law fail to support Appellant's legal argument, as Judge Young ruled; now on appeal, Appellant still fails to pinpoint a ***single undiscovered fact*** that has any bearing on the applicability of res judicata and collateral estoppel to the claims asserted against CitiMortgage.

Permitting Appellant to engage in any discovery would violate the "overriding rule of civil procedure" that "whatever doesn't make any difference, doesn't matter." *Powell v. Bank of Am.*, 379 S.C. 437, 447, 665 S.E.2d 237, 242 (Ct. App. 2008) (quoting

McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)). Because CitiMortgage was the named plaintiff in the foreclosure action, was the entity involved in the litigation of Appellant's Rule 60(b) Motion, and is a named defendant in the trial court action, the identification of Mass Mutual has no bearing on the applicability of res judicata and collateral estoppel. Thus, any discovery in this case would result in "merely . . . a fishing expedition" for a theory of recovery where none exists. *See Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54, 677 S.E.2d 32, 36 (Ct. App. 2009) (citing *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439)). Appellant has had her day in court and the request for a "developed record" does not change this result.

Based on the foregoing, Appellant has not identified specific facts for discovery and the lower court did not abuse its discretion when it granted summary judgment without any discovery in this case. Appellant's blanket assertion that "[f]urther inquiry into the facts is necessary to clarify the application of the law," is insufficient. (App.'s Initial Br. at p.17.) Therefore, the judgment below should be affirmed.

ii. Appellant fails to identify any novel issue of law in this case.

According to Appellant, this matter involves a "novel" question of law, which she identifies as the question of "whether res judicata applies in a suit complaining of mortgage servicing practices when the actual lender and real party in interest in the prior mortgage foreclosure suit was not the mortgage servicer." (*Id.*) While Appellant now tries to morph her Rule 17 challenge from the prior foreclosure action into a "novel" question of law, it is really the application of res judicata on the most fundamental level.

When CitiMortgage, the named plaintiff in the foreclosure action, served the Complaint on Appellant, she had thirty days pursuant to the South Carolina Rules of

Civil Procedure to answer, plead or otherwise respond. *See* S.C. R. Civ. P. 12(a). At that time, Appellant was required to assert "[e]very defense, in law or in fact, to a cause of action" in the pleading. *Id.* at 12(b); *see also* S.C. R. Civ. P. 8(c) (outlining that a party must "set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense"). An objection to CitiMortgage's position as the real party in interest is a defense that must be raised in response to the complaint or it is waived. *See, e.g., Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 169, 485 S.E.2d 371, 373 (1997) ("A challenge to a party's status as real party in interest must be made promptly or the court may conclude the point has been waived."); *WeSavFinancial Corp. v. Lingefelt*, 316 S.C. 442, 450 S.E.2d 580 (1994); *Bryson v. Bryson*, 378 S.C. 502, 509, 662 S.E.2d 611, 614 (Ct. App. 2008). Here, Appellant defaulted in the foreclosure action, failed to assert this defense in an answer, and, therefore, cannot seek to create a "novel" issue of law with the same question in a separate matter filed several years later in an attempt to avoid the applicability of preclusion principles.

"The purpose of a real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party and that such an action need be defended only once." *Bardoon*, 326 S.C. at 169, 485 S.E.2d at 373; *see also* S.C. R. Civ. P. 17(a). When a defending party fails to "timely raise[] [this issue] ***prior to the entry of default***," it is "***waived***." *Id.* at 170–71, 485 S.E.2d at 373–74 (holding the real party in interest challenge does not involve subject matter jurisdiction and, therefore, where the defendant failed to raise the argument prior to default, it was waived (emphasis added)). In this case, there is no argument that Appellant defaulted in the foreclosure action without raising any question related to CitiMortgage's status as the real party in

interest. Thus, there is no "novel" issue of law involved here. Having waived this argument in the foreclosure action, she cannot assert it in this action.

Based on the above, Appellant's attempt to reposition this defense, that she failed to properly raise in the foreclosure action, into a ground for reversal of the lower court ruling is evidence of her continued effort to re-litigate issues she should have litigated when the foreclosure action was filed. "The purpose of summary judgment is to obviate delay where there is no material issue of fact." *Loyd's Inc. v. Good*, 306 S.C. 450, 454–55, 412 S.E.2d 441, 444 (Ct. App. 1991); *see also Hammond v. Scott*, 268 S.C. 137, 143, 232 S.E.2d 336, 339 (1977) ("The manifest purpose of a summary judgment is to obviate delay where there is no real material issue of fact.") (per curiam). That is exactly what Judge Young's Order did in this case.[19]

V. THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF CITIMORTGAGE ON THE BASIS OF COLLATERAL ESTOPPEL WAS PROPER.

As an initial matter, CitiMortgage notes that while both res judicata and collateral estoppel are applicable to this matter, the theories apply in different ways since, on the most basic level, res judicata operates to bar **claims** and collateral estoppel operates to bar **issues**. Appellant ignores this distinction in discussing both doctrines.[20]

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[19]While CitiMortgage has specifically outlined why the legal issue outlined by Appellant is not "novel," CitiMortgage also notes that the case relied upon by Appellant, *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003), is misplaced because it is fatally different from this case. It involved the proffering of a newly-located expert witness, and factual development that was needed to clarify the application of the law to the facts, neither of which is present here. *See id.* at 323, 592 S.E.2d at 334. In contrast to the factual development necessary in *Schmidt*, the issue before the lower court in this case was a purely ***legal*** one—the application of res judicata and collateral estoppel when CitiMortgage was both the named plaintiff in the foreclosure action and a named defendant in this action. *See, e.g., Mickle v. Blackmon*, 255 S.C. 136, 141, 177 S.E.2d 548, 549 (1970) ("As a matter of law, one of several legal theories—Res judicata, estoppel by judgment, or law of the case—should prevent plaintiff's being forced to relitigate those issues."); *Smith v. Hastie*, 367 S.C. 410, 415, 626 S.E.2d 13, 16 (Ct. App. 2005).

[20]Appellant argues in passing that collateral estoppel does not apply because of her default prior to the issuance of the Judgment of Foreclosure & Sale. However, Appellant's argument is flawed in several respects. First, this is not a case of pure default where Appellant had absolutely no participation in the prior

Collateral estoppel is applicable to this case to the extent certain "issues" were actually litigated, meaning evidence was presented, testimony was taken, and a decision was made as to those particular issues, during the hearing on Appellant's Rule 60(b) Motion on March 18, 2009. At that time, Appellant argued that CitiMortgage failed to properly credit payments to her loan, CitiMortgage improperly failed to reinstate her loan, and that CitiMortgage induced her into not responding to the foreclosure complaint. (*See* Mot. to Vacate, Aff. of App., & 6/10/09 Order Den. Mot. to Vacate.) Then, when this action was instituted and CitiMortgage filed its Motion to Dismiss, Appellant argued the same, exact issues at the hearing held on October 12, 2011, in an attempt to defeat a ruling in favor of CitiMortgage. (*See* Hr'g Tr. 8:16–10:9, 11:2–12:2, 13:8–16.)[21] As outlined on pages 5–6, *supra*, Appellant ***admitted and confirmed*** at the Motion to Dismiss hearing that these issues were raised before the Master. For Appellant to now claim that these issues were not litigated and decided is entirely erroneous. Based on the

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foreclosure suit; she appeared—belatedly, by her choice—and contested the validity of the judgment. Appellant's participation in the prior suit distinguishes her situation from the authority she cites in her Initial Brief and rebuts her argument that nothing was argued or decided in the prior suit. Appellant cannot ignore the issues that were actually litigated during the Rule 60(b) hearing. Second, courts have consistently held that a default judgment should be given preclusive effect where the party being collaterally estopped participated in the prior action. *See Bush v. Balfour Beatty Bahamas*, 62 F.3d 1319 (11th Cir. 1995) ("[T]he 'actual litigation' requirement may be satisfied by ***substantial participation*** in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so.'") (citation omitted, emphasis added); *ColeMichael Invs., L.L.C. v. Burke*, 436 B.R. 53 (N.D. Ill. 2010) (noting that a default judgment is "actually litigated" for collateral estoppel purposes if the record reflects factual findings sufficient to demonstrate that the issue was contested and decided.) (citing *Caton v. Trudeau*, 157 F.3d 1026, 1029 (5th Cir. 1998)); *see also Ruey Mao Chen*, 49 Fed. App'x at 160 ("Collateral estoppel will apply to findings in connection with a motion to set aside the default judgment when 'the moving party was in fact given a hearing on the motion that was the equivalent of a trial with oral testimony.'") (citation omitted). Third, the only South Carolina case Appellant cites—*State v. Bacote*, 331 S.C. 328, 503 S.E.2d 161 (1998)—does not involve a default, but rather analyzed the preclusive effect of a prior administrative hearing in a DUI license suspension context.

[21] CitiMortgage notes that the evidence and argument presented to the Master during the Rule 60(b) hearing is markedly similar to the arguments presented at the hearing in response to CitiMortgage's Motion to Dismiss and markedly similar to the "facts" outlined in Appellant's Statement of the Case on appeal. (*See* App.'s Initial Br. at pp.6–9.) This further emphasizes that ALL of these issues were presented to the Master, considered, and actually decided, meaning collateral estoppel attaches and Appellant is not entitled to litigate these issues again. Appellant should not be permitted to litigate issues that were already heard and decided until she receives a result that she deems satisfactory.

fact that the issues were considered and decided by the Master, Judge Young properly ordered that Appellant's claims in this action stemming from the issues decided in the foreclosure action were barred by collateral estoppel. (*See* Order at ¶¶ 17–20.) Each of Appellant's arguments related to the doctrine of collateral estoppel is addressed below.

A. Appellant's argument that collateral estoppel does not apply because the Master's ruling is encompassed by a document titled "Order," rather than "Judgment" results in a distinction without a difference.

Appellant takes an overly technical reading of the Reinstatement (Second) of Judgments on collateral estoppel in an attempt to concoct a distinction that is, ultimately, inconsequential. Specifically, she argues that collateral estoppel applies only to claims decided in a judgment, not an order. This "distinction" is incorrect for several reasons.

First, Appellant's argument highlights language that the courts do not. While some South Carolina courts use the word "judgment" when defining collateral estoppel, others simply do not. *See, e.g., Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009) ("Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a ***prior action***") (citation omitted, emphasis added); *Jinks v. Richland Cnty*, 355 S.C. 341, 349, 585 S.E.2d 281, 285 (2003) (same). This difference in phraseology indicates that the significant factor for purposes of collateral estoppel is not the particular title given to the prior ruling but the fact that the claim was considered, decided, and resolved. Ultimately, the distinction proposed by Appellant emphasizes form over substance.[22]

[22]Other courts have explicitly recognized that collateral estoppel applies to both orders and judgments, regardless of title. *See Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. Ct. App. 2000) ("The doctrines of res judicata and collateral estoppel apply to court orders, as well as judgments, when they are final and subject to appeal."); *Karibjanian v. Chromalloy Pharm., Inc.*, No. 90-4641, 1991 U.S. Dist. Lexis 8890, at *2 (E.D. Pa. June 28, 1991).

Second, the term "order" is encompassed by the term "judgment" and, therefore, an order can be a final judgment for purposes of appellate review and the applicability of collateral estoppel. Specifically, Black's Law Dictionary defines "judgment" as follows:

> A court's final determination of the rights and obligations of the parties in a case. • The term *judgment* includes an equitable decree and ***any order from which an appeal lies***.

Black's Law Dictionary (9th ed. 2009), judgment (emphasis added). In this case, as noted by Judge Young, the ruling on Appellant's Rule 60(b) motion was a final order. The proper course for Appellant, when she was unsatisfied with the Master in Equity's ruling on her Rule 60(b) motion, was to appeal. (*See* Hr'g Tr. 18:6–11.) Appellant's failure to seize this opportunity does not result in her claims now being appealable to the trial court for reconsideration. (*Id.* at 11:24–12:2 ("I'm not an appellate Court. I don't set and redo what he has to say. If you didn't like that, they should have appealed.").)

Third, the distinction Appellant seeks to make is illogical. Courts routinely issue *orders* that rule on dispositive motions.[23] Such orders are not captioned "judgments," but they are certainly entitled to preclusive effect. *See, e.g., Crosby v. Prysmian Communs. Cables & Sys. USA, LLC*, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012) (holding that an "order granting partial summary judgment" had preclusive effect). Under Appellant's argument, an order granting summary judgment on a party's claims would not prevent relitigation of those claims in a later suit simply because it is not captioned "judgment." Clearly this cannot be correct. Essentially, Appellant's argument would elevate form over substance in a way contrary to decades of settled law. Therefore, collateral estoppel bars her claims that are based on issues previously litigated.

[23]Following Appellant's reasoning to its logical conclusion, the Order entered on January 6, 2012, in this matter, would not be a "judgment" for purposes of collateral estoppel. Such a conclusion is illogical.

B. Each element of collateral estoppel is met in this case.

The majority of Appellant's arguments against the applicability of collateral estoppel are due to her prior default in the foreclosure action and the litigation of her Rule 60(b) motion. According to Appellant, while she presented evidence and testimony to the Master related to those same issues she now seeks to raise in the lower court action, the elements of collateral estoppel are not met. This is incorrect. The South Carolina Supreme Court has held that "where 'all of the facts necessary to prove the material elements in [the second] action would be essentially the same' as those in the first action, the doctrine of estoppel would bar the second action even though the plaintiff brought the second action ***upon a different claim or demand***." *Jones v. City of Folly Beach*, 326 S.C. 360, 367, 483 S.E.2d 770, 774 (Ct. App. 1997) (citing *Dunlap v. Travelers Ins. Co.*, 223 S.C. 150, 157, 74 S.E.2d 828, 831 (1953)) (emphasis added).

As noted in the Statement of the Case, *supra*, Appellant defaulted in the 2008 foreclosure proceeding that preceded this litigation. After defaulting in that action, she filed a Rule 60(b) Motion to set aside the Judgment of Foreclosure & Sale. As part of her Rule 60(b) Motion and during the hearing on the same, she raised all of the issues she now seeks to form the basis of her claims for damages. The Master considered Appellant's arguments, along with her evidence on the same, found them unpersuasive, and denied her Rule 60(b) Motion. Thus, it is not Appellant's default in the foreclosure action that serves as the basis for collateral estoppel, it is the litigation of the underlying issues during her Rule 60(b) Motion. When Appellant brought this suit years later, the lower court properly dismissed the claims as collaterally estopped because the underlying issues had been litigated and decided as part of the prior foreclosure action.

i. The South Carolina Supreme Court considered a situation markedly similar to the current matter and found the plaintiff's claims barred by collateral estoppel.

In a recent opinion, the South Carolina Supreme Court held that collateral estoppel barred a party from raising claims previously decided by a default judgment which the party tried unsuccessfully to set aside. This same analysis is applicable here.

In *Aaron v. Mahl*, 381 S.C. 585, 674 S.E.2d 482 (2009), the plaintiff was sued in California state court, where she failed to appear and a default judgment was entered against her. In the California case, the plaintiff moved unsuccessfully to have the default set aside. Later, the judgment was assigned to the defendant in the later action, in South Carolina, for collection. The South Carolina trial court refused to enforce the judgment, but the Supreme Court reversed, holding the plaintiff was not entitled to collaterally attack the prior default judgment and refusal to set it aside. The Supreme Court specifically noted that the argument the plaintiff made in the South Carolina trial court was the same one she had made in her "post-judgment litigation" in California. *Id.* at 593 n.9, 674 S.E.2d at 486 n.9. The current case is strikingly similar.

The Appellant sought to assert claims based on issues that were previously heard and decided during the hearing on her Rule 60(b) motion to set aside the Judgment of Foreclosure & Sale—a judgment that was entered by default. Accordingly, based on the *Aaron* case, Judge Young properly held that the claims were collaterally estopped due to the underlying issues having already been litigated and decided in favor of CitiMortgage. Appellant's arguments to the contrary are foreclosed by the South Carolina Supreme Court's holding in *Aaron v. Mahl*. However, as outlined below, even putting aside this case, which is directly on point, the particulars of Appellant's arguments are incorrect.

ii. Issues raised at the Rule 60(b) stage are "actually litigated."

"Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was actually litigated and determined by a valid and final judgment in a prior suit." *In re Crews*, 389 S.C. 322, 340, 698 S.E.2d 785, 794 (2010) (citing *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008)). In this case, Appellant admits that during the Rule 60(b) hearing she was able to present all of her evidence related to the underlying issues of which she now complains against CitiMortgage. (*See* Hr'g Tr. 14:24–25 (admitting "she showed copies of the fax and the checks and the certified checks and all that").) Further, the Master's order specifically notes that Appellant had an opportunity to and did testify during the hearing on her motion. (*See* 6/10/09 Order) Having considered the testimony and evidence presented by both parties, the Master then ruled that her "testimony" was "not supported by the record" and that the "facts and law [were] ***overwhelmingly against*** [Appellant]." (*Id.* at pp.2, 4–5 (emphasis added).) Not only is there nothing more required to satisfy the "actually litigated" requirement, Appellant fails to identify what more is allegedly needed.

As noted by the South Carolina Supreme Court in *Aaron*, an issue is "actually litigated" when it is the subject of "post-judgment litigation," such as a Rule 60(b) Motion. In line with this result are other courts, which have recognized the preclusive effect of a motion to set aside a default judgment. *See, e.g., Ruey Mao Chen v. Yung Yu Yang*, 49 Fed. App'x 159, 160 (9th Cir. 2002) ("Collateral estoppel will apply to findings in connection with a motion to set aside the default judgment when 'the moving party was in fact given a hearing on the motion that was the equivalent of a trial with oral testimony.'") (citation omitted); *Lang v. Vickers*, 247 B.R. 530, 535 (Bankr. M.D. Fla.

2000) ("[T]he fact that the state court denied Defendant's subsequent motion to set aside the default judgment only strengthens the Court's conclusion that the issue of fraud was 'actually litigated.'"); *Braxton v. Litchalk*, 223 N.W.2d 316 (Mich. Ct. App. 1974); *Sahn v. Brisson*, 204 N.W.2d 692 (Mich. Ct. App. 1973); *see also Manucy v. Hartman*, 274 B.R. 911, 915 (Bankr. M.D. Fla. 2002) ("'Actually litigated' only contemplates that the defendant has been given a full opportunity to defend himself.") (citation omitted).

Here, Appellant appeared and sought to set aside the Judgment of Foreclosure & Sale, including her default in that matter. She was given a "hearing on the motion," *Ruey Mao Chen*, 49 Fed. Appx. at 160, and had a sufficient opportunity to appear, present evidence, and assert her arguments through testimony. Based on the foregoing, Appellant's appearance and participation in litigating her Rule 60(b) Motion is sufficient to satisfy the "actually litigated" requirement of collateral estoppel. *See McNaughton-McKay Elec. Co. v. Andrich*, 324 S.C. 275, 279, 482 S.E.2d 564, 566 (Ct. App. 1996) ("Collateral estoppel will bar the relitigation of an issue which was actually litigated and ***necessary to the outcome of a prior lawsuit***." (emphasis added)).

iii. Lack of success on the Rule 60(b) Motion is not evidence that the "essential" to prior judgment element is not met.

Appellant makes the tenuous argument that because the Master's ruling was titled an "order" and not a "judgment," the findings of the Master were not "essential" to the Judgment of Foreclosure & Sale. This argument is entirely erroneous in that it ignores the Master's order on the Rule 60(b) Motion when outlining what constitutes "essential." Further, Appellant's argument ignores the applicability of this element as stated by the South Carolina Supreme Court.

"Under the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, where on the same or a different claim." *Carman v. S.C. Alcoholic Beverage Control Comm'n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994). In *Carman*, the South Carolina Supreme Court explained that the "essential or necessary" requirement comes into play only when collateral estoppel is being applied to issues ***impliedly*** decided in the prior ruling. Where the issue itself is raised directly in the prior matter, such as through testimony or evidence, it is necessarily essential to the judgment. Stated differently, collateral estoppel applies to issues that were expressly adjudicated, such as in this case, or which were impliedly adjudicated because they were necessary to the judgment:

> The estoppel of a judgment does not extend to matters not expressly adjudicated, and which can be inferred only by argument or construction from the judgment, except where they are necessary and inevitable inferences in the sense that the judgment could not have been rendered as it was without deciding such points.

Id. (citing *Dunlap & Dunlap v. Zimmerman*, 188 S.C. 322, 199 S.E. 296 (1938)).

In this case, as outlined extensively above, the issues related to the servicing of Appellant's loan, the payments made on her loan, and the alleged reinstatement of her loan—all which form the basis of Appellant's claims for damages in this case—were considered and ruled upon by the Master. Accordingly, the issues were addressed directly by the Master, thereby resulting in the 2009 order. As such, the "essential and necessary" requirement is not implicated here in the way Appellant suggests.

Additionally, other courts have clarified that an issue is "essential or necessary" so long as it is not mere dicta. *In re Banks*, 805 A.2d 990 (D.C. 2002) (noting that

collateral estoppel applies to issues "where the determination was essential to the judgment, and not merely dictum.") (citation omitted); *Pollicino v Roemer & Featherstonhaugh*, 277 A.D.2d 666, 668 (N.Y. Ct. App. 2000). Here the issues Appellant seeks to raise were squarely decided—not mere dicta—in the ruling by the Master on the Rule 60(b) Motion and, thus, they were necessary and essential to that ruling.

C. Appellant's reliance on two "exceptions" to the applicability of collateral estoppel is misplaced.

In addition to incorrectly arguing that collateral estoppel is inapplicable to this matter, Appellant also argues that two "exceptions" found in the Restatement (Second) of Judgments § 28(3)–(4) (1982) are applicable to this case. The two exceptions are: (1) a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed by the two courts or by factors relating to the allocation of jurisdiction and (2) the party against whom preclusion is sought has a significantly heavier burden of persuasion with respect to the issue in the initial action. (App.'s Initial Br. at p.22.) Appellant is incorrect on both counts.

i. Extensiveness of procedures/jurisdiction favors CitiMortgage.

As to the first exception cited, Appellant fails to provide any argument or any case law in support of her position. *Potter*, 395 S.C. at 24, 716 S.E.2d at 127 ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory."). This is likely because the exception is entirely inapplicable here. In fact, there are only a handful of South Carolina state court cases that have even cited to the "exceptions" in the Restatement. *See, e.g., State v. Bacote*, 331 S.C. 328, 503 S.E.2d 161 (1998); *Pye*, 325 S.C. at 426, 480 S.E.2d at 455. These cases do not support Appellant's arguments.

"The doctrine of collateral estoppel is intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided." *Bacote*, 331 S.C. at 331, 480 S.E.2d at 163. The third exception only comes into play where there is a difference between the procedures or jurisdiction between the two courts in which the actions are pursued, such as the difference between an administrative proceeding and a criminal action. *See id.* at 332, 480 S.E.2d at 163 (citing *State v. Williams*, 667 N.E.2d 932 (Ohio 1992) and noting its holding that an administrative license revocation does not preclude litigation of the same issue in a criminal prosecution). Here, it is hard to discern how there is any difference in the procedures followed, considering the Rule 60(b) hearing involved presentation of evidence and taking of testimony, and there is absolutely no argument that the "allocation of jurisdiction" between the court in the foreclosure action and the trial court in this action differs.

In short, based on the foregoing, the exception cited by Appellant has only been applied in South Carolina where the two adjudications were in radically different fora, *i.e.*, an administrative hearing versus a criminal trial. *Id.* at 333, 480 S.E.2d at 164 (holding "if every license revocation hearing carries with it potential collateral estoppel impact on a subsequent criminal action, the State may feel compelled to intervene in every administrative action to effectively protect its interests in some future criminal proceeding"). Confirming this limited applicability are other courts that have applied the exception in a similar fashion. *See, e.g., Freeman United Coal Mining Co. v. Office of Workers' Comp. Prog.*, 20 F.3d 289, 294 (7th Cir. 1994) (contrasting a proceeding before a state industrial commission with a subsequent action before administrative law judge);

Holbert's, Inc. v. Audi of Am., Inc., No. 12-725, 2012 U.S. Dist. Lexis 64447 (E.D. Pa. May 8, 2012) (contrasting proceeding before a state board with federal court action). Accordingly, here, the prior adjudication was in the same forum as the subsequent suit. The fact that the two proceedings presented different procedural postures; a Rule 60(b) Motion versus claims for damages, is insignificant. The foreclosure court heard, considered, and rejected Appellant's arguments that underlie her present claims. She should not be permitted a second bite at the apple by raising the same claims between the same parties in the guise of filing a new case with a different civil action number.

ii. Appellant had a similar burden on her Rule 60(b) Motion.

The second "exception" cited by Appellant is similarly inapplicable. Not only did Appellant not carry a "significantly heavier burden of persuasion" during the hearing on her Rule 60(b) Motion sufficient to satisfy the fourth exception, any distinction in the burdens was self-created.

First, Appellant again fails to cite any case law, beyond those cases identifying potential "exceptions" to the applicability of the doctrine, in support of her position that the burden of persuasion in the Rule 60(b) Motion was significantly heavier than her burden of persuasion in proving each of her underlying causes of action, thereby waiving this argument. *Potter*, 395 S.C. at 24, 716 S.E.2d at 127 ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory."). Second, the only South Carolina case even considering, and ultimately rejecting, this "exception" was *Pye*, 324 S.C. at 439–40, 480 S.E.2d 461–62. In that case, the court considered this argument and determined that the burden of proof was identical in a federal action as in a state action. Here, Appellant's argument similarly fails.

In order to establish her claims for damages, Appellant would have to prove each element of each cause of action by a preponderance of the evidence.[24] Specifically, "[f]indings of fact based upon a 'preponderance' of the evidence are those supported by the greatest 'weight, amount, credibility or truth' as reflected by the whole of the evidence before the court, or 'evidence which convinces as to its truth." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 346, 415 S.E.2d 384, 388 (1992) (citing *Frazier v. Frazier*, 228 S.C. 149, 89 S.E.2d 225, 235 (1955)). Similarly, a party seeking to set aside a judgment pursuant to Rule 60(b) bears a similar burden: "[T]he burden of presenting evidence entitling him to the requested relief." *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 93 S.E.2d 857, 863 (Ct. App. 2009); *see also McClurg v. Deaton*, 380 S.C. 563, 574, 671 S.E.2d 87, 93–94 (Ct. App. 2008) ("A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief.").[25] Here, at the hearing on Appellant's Rule 60(b) Motion, the Master looked at all of her evidence, including her own testimony. (6/10/09 Order p.2 ("Drexler's testimony—that payments she made would reinstate her mortgage—are not supported by the record before me."). This is the same evidence or "facts" that Appellant outlined in her Complaint in this action and the same outlined in her "Statement of the Case" in her Initial Brief on appeal. This same evidence, which Appellant continues to

[24]Even Appellant's example is incomplete. In her Initial Brief, she states that "for example, Appellant's negligence claim in the instant case merely requires a showing by a preponderance of the evidence that Respondent's sloppiness in servicing her loan injured her." (App.'s Initial Br. at p.23.) However, not only does she have to prove "causation," she has to prove that a duty was owed by CitiMortgage, which she cannot do due to the applicability of the economic loss doctrine, and damages—all by a preponderance.

[25]*South Beach Mort. & Inv. Copr. v. Avila* , No. 1:11-cv-24187-KMM, 2012 U.S. Dist. LEXIS 78371, at *10 (S.D. Fla. June 6, 2012) ("A party seeking relief pursuant to Rule 60(b) bears the burden of proving excusable neglect and must do so by a preponderance of the evidence." (citation omitted)); *Huh v. Wang*, 71 Cal. Rptr. 3d 65, 77 (Ct. App. 2007) ("As the moving party, appellant had the burden of establishing entitlement to relief from the judgment. He was required to "establish his position by a preponderance of the evidence." (citation omitted)).

reiterate was insufficient for purposes of her Rule 60(b) Motion then and, therefore, is necessarily insufficient to meet a preponderance of the evidence standard now.

To the extent Appellant argues that the burden was higher because the property was sold to Stonegate or because she claimed fraud, these higher burdens were the result of Appellant's own dilatory conduct and, therefore, are insufficient to satisfy an "exception" to the applicability of collateral estoppel. In a very recent opinion, this Court confirmed that the "doctrine of collateral estoppel, or issue preclusion, rests generally upon equitable principles." *S.C. Pub. Interest Found. v. Greenville Cnty.*, No. 5016, 2012 S.C. App. LEXIS 216 (Ct. App. Aug. 1, 2012) (citing *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995)). Accordingly, any "exceptions" thereto are to be applied with an aim toward equity. *See id.* at *24 (recognizing that "the potential adverse impact on the public interest has been recognized as a reason to depart from the doctrine of collateral estoppel"). Appling an "exception" in this situation would obliterate the equity behind collateral estoppel.

Moreover, cases addressing this issue directly confirm this result. The quintessential example of exception four in the Restatement is where a prior criminal action does not bar to relitigation of claims in a subsequent civil action—a clear distinction between burdens of proof. *See Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720, 740 (Fed. Cl. 2003). In contrast, courts have declined to apply the Restatement's exceptions to situations where the prior adjudication involves merely a different procedural posture or type of action. *See, e.g., In re Yanks*, 931 F.2d 42 (11th Cir. 1991) (holding that § 28(4) did not apply and that a prior state court defamation suit precluded

relitigating the same claims in a subsequent bankruptcy proceeding). Because this case is an example of the latter, the exception is not applicable.

VI. RES JUDICATA UNQUESTIONABLY APPLIES TO THIS ACTION.

Appellant goes to great lengths to ignore the fact that she was aware of her alleged "claims" when the foreclosure action was happening and that she was aware CitiMortgage was pursuing the foreclosure action, all so she can claim that she should be allowed to pursue her compulsory counterclaims now that it suits her. This is contrary to South Carolina law. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of the prior action between those parties." *Plott v. Justin Enters.*, 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. App. 2007). "Under *res judicata,* a litigant is barred from raising any issues which were adjudicated in the former suit and any issues ***which might have been raised*** in the former suit." *Id.* (emphasis added). Because Appellant's claims were compulsory counterclaims in the foreclosure action, Judge Young properly ruled that those claims are now barred by res judicata. Appellant's arguments to the contrary are futile.

A. Appellant's "nominal" party argument is not supported by the case law on this issue and is waived to the extent she now challenges CitiMortgage's status under Rule 17, SCRCP.

Appellant attempts to avoid the applicability of res judicata stating that CitiMortgage was a "nominal party" in the foreclosure action. However, she cites no South Carolina authority that addresses this particular issue and blatantly ignores South Carolina authority that refutes her argument. As outlined below, Appellant's argument does not defeat the applicability of res judicata.

i. Parties and their privies.

Res judicata requires a showing of three essential elements: "(1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." *Yelsen Land Co., Inc. v. State,* 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citing *Judy v. Judy*, 393 S.C. 160, 167, 712 S.E.2d 408, 412 (2011)). Appellant's argument here focuses only on the first requirement. (*See* App.'s Initial Br. at p.26 (citing Restatement (Second) of Judgments § 36(2)). First, she appears to misunderstand what constitutes a real party in interest as opposed to a mere nominal one. Courts have consistently explained that a real party in interest is one "'who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.'" *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006). Here, as held by the Master, CitiMortgage was no mere nominal party. In fact, the Master held that CitiMortgage was the holder of the Note, had proved Appellant defaulted on her payment obligations, and that it had a real, material, and substantial interest in the foreclosure. In fact, even during the hearing before Judge Young, Appellant essentially admitted that all of her complaints then and all of her complaints now relate to CitiMortgage's servicing of her loan. (Hr'g Tr. 8:16–10:12.) In both instances, CitiMortgage has a real and substantial interest in the litigation.[26]

Second, Appellant's argument ignores entirely one significant fact—res judicata applies to parties ***and their privies***. *See, e.g., Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81-82 ("Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies.")

[26] Appellant admits CitiMortgage represented that it held the Note in the prior foreclosure action and, because this was heard, considered, and ruled upon by the Master and Appellant did not appeal, it is a decided issue that she cannot contest in this litigation. (*See* Compl. ¶ 66.)

(citation omitted); *see also Yelsen*, 397 S.C. at 22, 723 S.E.2d at 596. In *Yelsen*, the Supreme Court affirmed a grant of summary judgment based on res judicata where the party asserting res judicata was in privity with the defendant in the prior suit. The court noted that "[f]or purpose of res judicata, however, the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation." *Id.* (citing *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986)). In this case, even assuming Mass Mutual was the investor related to Appellant's loan, both CitiMortgage and Mass Mutual share the same interest in the litigation—ensuring that the default on Appellant's payment obligations was accepted and remedied through the foreclosure process.

In fact, one case Appellant relies on to support her argument—*Williams v. Peabody*, 719 S.E.2d 88, 94 (N.C. Ct. App. 2011)—recognizes that res judicata applies to those who stand in privity with the parties to the original action. Indeed, *Williams* goes farther than the portion quoted by Appellant in her Initial Brief and holds that a non-party who controls an action can later assert res judicata in a subsequent action:

> A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary interest or financial interest in the judgment or in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions; if the other party has notice of his participation, the other party is equally bound.

Id. (quoting *Thompson v. Lassiter*, 246 N.C. 34, 39, 97 S.E.2d 492, 496 (1957)) (emphasis added). Thus, even assuming *arguendo* that CitiMortgage was a nominal party in the prior foreclosure action, CitiMortgage controlled the action, as acknowledged by

Appellant, and had a financial interest in its resolution. Thus, both CitiMortgage and Appellant are bound by that adjudication.

ii. Appellant's cases distinguished.

The other purportedly persuasive cases cited by Appellant are easily distinguishable from the current case. In *Hurt v. Pullman*, the court considered the question of whether a prior state court action between a claimant and his employer barred a subsequent federal ERISA action between the claimant and his employer's pension plan. 764 F.2d 1443 (11th Cir. 1985). The appeals court held that the employer and its pension plan were not in privity with one another because under the "complicated statutory provisions of ERISA" an employer has a distinct role "as trustee under an ERISA pension plan." *See id.* at 1449. Here, there is no such statutorily imposed distinct role. The *Hurt* court also noted the divergence of interests between the employer acting in its individual capacity and the pension plan acting in a *fiduciary* capacity. *See id.* at 1450. Here, there is no such divergence. And, in fact, the Fourth Circuit Court of Appeals decision in *Horvath v. Bank of New York*, 641 F.3d 617 (4th Cir. 2011) prevents any argument by analogy. There, the Fourth Circuit held that it was "difficult to see how [plaintiff's] argument could possibly be correct," noting the language in the Note and Security Instrument that allows transfers of the powers therein and determined it is "difficult to debate that [the foreclosing entity] had the authority to enforce the note by appointing a substitute trustee and foreclosing on the property." *Id.* at 622; *see also Reese v. United States Bank Nat'l Ass'n*, No. 2:11-2990-CMC, 2012 U.S. Dist. LEXIS 74652, at *8–9 (D.S.C. April 30, 2012) (same).[27] Because CitiMortgage's interest in the

[27] As outlined in Section III, *supra*, courts have consistently held that an investor/trustee and a servicer are in privity for purposes of res judicata. *See also Brunson v. Bank of N.Y. Mellon*, 2012 UT App. 222, P4

foreclosure suit is aligned with its interest in this case, it is not appearing in different capacities and res judicata is applicable.

Additionally, the case of *Brinkman v. Baltimore & Ohio R.R.*, 172 N.E.2d 154 (Ohio Ct. App. 1960), supports CitiMortgage's arguments. In *Brinkman*, a mother and daughter were involved in a train-on-car accident where the mother died. The mother's estate brought a suit against the railroad in which the daughter and her siblings were named as those for whose benefit the action was sought. The railroad prevailed. The injured daughter subsequently brought suit against the railroad, and the court held that her suit ***was barred*** by res judicata. The *Brinkman* court acknowledged that a personal representative could appear in varying capacities and not be bound, but held that both suits in consideration were brought for the benefit of the daughter and thus she was a real party in interest in both suits and was bound by the former one. Applied to the case at bar, this rule indicates that because CitiMortgage had a real interest in the former litigation, it is a real party in interest and Appellant is bound by res judicata.

B. Appellant combines arguments related to collateral estoppel and res judicata in an attempt to create an appealable issue where none exists.

Appellant's argument that the subject matter of the instant suit allegedly differs from that of the prior foreclosure suit boils down to one argument: that the claims Appellant now attempts to assert were allegedly not compulsory in the foreclosure action. Appellant's tortured and obscenely narrow reading of Rule 13(a), SCRCP would completely obliterate the rule's purpose and, therefore, is not proper. While Appellant's

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(Utah Ct. App. Aug 9, 2012) (finding the first and second actions "pertain[ed] to the same loan, the same property, the same foreclosure, the same Trust Deed, and the same remedies sought . . . against the named Defendants. . . . [and] [b]ecause the claims and issues in the Second Action had been previously litigated against parties who were in privity with BNY, this distinction does not support a different result"). Therefore, any reference to a "servicing contract," about which Appellant speculates serves only to support the existence of privity. (*See* App.'s Initial Br. at p.25.)

regret for failing to raise issues in her foreclosure action is clear, it does not serve as a basis for allowing her to litigate those issues now.

i. Appellant's claims were unquestionably compulsory.

Res judicata bars not only the claims that actually were adjudicated in a prior suit, but also the claims that should have been adjudicated in that suit. *See Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). Accordingly, "'[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are "compulsory" under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted.'" *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002) (quoting reporter's note to Rule 13, SCRCP). It is well-established that in determining whether a counterclaim is compulsory and thus precluded by res judicata, courts rely on the "logical relationship" test. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). Here, there can be no question that the trial court correctly ruled that Appellant's counterclaims were compulsory and, therefore, barred by res judicata.[28]

The only counterclaims that Appellant claims were not compulsory are those for alleged violation of the SCUTPA, negligence, tortious interference with contract, negligent misrepresentation and fraud. (App.'s Initial Br. at p.34.) In making this argument, Appellant relies on *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989), which actually supports CitiMortgage's position that the claims were compulsory in the foreclosure action. In that case, Appellant states that the

[28] Appellant concedes on appeal that her claims to void and cancel the mortgage assignment (Compl. ¶¶ 61–63), wrongful foreclosure via lack of standing (*Id.* at ¶¶ 64–68), breach of contract (*Id.* at ¶¶ 69–73), breach of the implied covenant of good faith and fair dealing (*Id.* at ¶¶ 74–78), unjust enrichment (*Id.* at ¶¶ 79–81), quiet title (*Id.* at ¶¶ 91–95), slander of title (*Id.* at ¶¶ 96–103), in the present action satisfy the logical relationship test and, therefore, are barred by res judicata. (*See* App.'s Initial Br. at p.33.)

"distinguishing factor between those claims that were held to be compulsory—the claims that ***would have avoided default under the promissory note***—and the claim held to be permissive—the claim to enforce the plaintiff's purchase of the defendant's interest in the joint venture—was the fact that the former would have affected the plaintiff's ability to enforce the promissory note, whereas the latter would not." (App.'s Initial Br. at p.32 (emphasis added).) Here, as argued by CitiMortgage during the Motion to Dismiss phase and ruled upon by Judge Young, Appellant's claims relate directly to whether she was in default under the terms of the Note.[29]

Undoubtedly, pursuant to Appellant's own definition of the "subject matter of the prior suit," each of her claims relate to the servicing of her loan and specific duties and obligations under the Note and Mortgage.[30] If the servicing of her loan was faulty, which

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[29]CitiMortgage notes that Appellant continually refers to "Mass Mutual's ability to foreclose," CitiMortgage not being a "party to the loan contract," and her "breach of a mortgage contract she had entered with Mass Mutual." These statements are not only factually incorrect—CitiMortgage did hold the Note, thereby having the authority to foreclose; Mass Mutual was not the foreclosing entity; and the originating lender was Compass Mortgage, Inc., not Mass Mutual—but also improper here because they all relate to "standing," which had to have been raised in the prior foreclosure action. Putting aside this rhetorical, hypothetical, and inexplicable question posed by Appellant, i.e., "whether claims brought on the basis of actionable conduct by a third party that results in a breach of contract between two other parties is ever logically related to the subject matter of claims brought pursuant to the broken contract" (App.'s Initial Br. at p.34.), the facts are simple: ***CitiMortgage filed*** for foreclosure against Appellant, she defaulted and failed to raise her compulsory counterclaims, she waited years to bring an independent action ***against CitiMortgage***, asserting those compulsory counterclaims, which are now barred by res judicata.

[30]A review of Appellant's Complaint related to the SCUTPA, negligence, tortious interference with contract, negligent misrepresentation, and fraud claims is enlightening:

- SCUTPA. CitiMortgage allegedly "engaged in deceptive business practices with respect to mortgage loan servicing, assignments of notes and mortgages, [and] foreclosure of residential properties" (Compl. ¶ 85);
- Negligence. CitiMortgage allegedly "breached its duty of care and skill to Plaintiff in the servicing of Plaintiff's loan" (*Id.* at ¶ 46);
- Tortious Interference with Contract. CitiMortgage allegedly "refused properly to carry out its task to service the terms of the contract between Plaintiff and third party" and "failed to discharge its duty to Plaintiff as well as to third party in taking reasonable steps to ensure that all installment payments were promptly credited to the correct account" (*Id.* at ¶ 108);
- Negligent Misrepresentation. CitiMortgage allegedly misrepresented "instructions regarding how, when, for what amount, and to whom to make payments" (*Id.* at ¶ 112); and
- Fraud. CitiMortgage allegedly "engaged in a pattern and practice of defrauding Plaintiff in that, during the life of the mortgage loan, Citi failed properly to credit payments made" (*Id.* at ¶ 49).

CitiMortgage vehemently disputes, she may not have been in default on her payment obligations, thereby affecting CitiMortgage's ability to enforce the default provision of the Note and, therefore, there is no question that the claims were compulsory. Accordingly, each claim bears a logical relationship to the foreclosure and, thus, each was a compulsory counterclaim under the logical relationship test.[31] In sum, Judge Young did not err in dismissing the claims, each of which was a compulsory counterclaim in the prior foreclosure suit and, thus, is now barred by res judicata.

ii. Appellant's argument that the claims did not arise until after the foreclosure suit was filed is ineffective.

Appellant also argues that "many" of her allegations concern conduct that occurred after June 18, 2008. (*See* App.'s Initial Br. at p.30.) This argument ignores the fact that those "facts" were specifically considered and rejected by the Master and,

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[31]Additionally, South Carolina courts have previously held that several of the claims Appellant raises here are compulsory counterclaims in a foreclosure suit:

- Fraud. *See Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (holding that fraud counterclaim was compulsory in foreclosure suit).
- Breach of contract. *See DAV Corp.*, 298 S.C. at 514, 381 S.E.2d at 903 (holding breach of contract claim arising from loan was compulsory counterclaim in foreclosure suit).
- Violation of SCUTPA. *See id.* (holding SCUTPA claim was compulsory counterclaim in foreclosure suit).

As to Appellant's remaining claims, other courts have held each is compulsory in a foreclosure suit:

- Negligence. *See Springs v. First Nat'l Bank*, 835 F.2d 1293 (9th Cir. 1987) (holding that negligence claim arising from loan should have been brought as a compulsory counterclaim in prior foreclosure action).
- Breach of implied covenant. *See Linn v. NationsBank*, 14 S.W.3d 500 (Ark. 2000). (holding borrowers' claims of breach of contract, fraudulent misrepresentation, and breach of good faith arose directly from loan transactions and were compulsory counterclaims in foreclosure suit).
- Unjust enrichment. *See Keybank Nat'l Ass'n v. Sargent*, 758 A.2d 528 (Me. 2000) (holding that claim for unjust enrichment should have been asserted as compulsory counterclaim in prior foreclosure suit).
- Quiet title. *See United States v. Porath*, 764 F. Supp. 2d 883 (E.D. Mich. 2011) (noting that defendant properly filed quiet title claim as a compulsory counterclaim in foreclosure suit).
- Negligent misrepresentation. *See Pomfret Farms Ltd. P'ship v. Pomfret Assocs.*, 811 A.2d 655, 659 (Vt. 2002) (applying a compulsory counterclaim rule identical to Rule 13(a) and finding that the plaintiff's misrepresentation claim was compulsory because it arose from the same property transaction that gave rise to the opposing party's claim for recovery on a mortgage note).

therefore, barred by collateral estoppel. Thus, yet again, Appellant confuses the applicability of res judicata and collateral estoppel.

Collateral estoppel bars those underlying issues or "many" facts as stated by Appellant that were previously considered and rejected by the Master. These issues include Appellant's allegation that CitiMortgage made certain assurances to her[32] and certain payments were made. (Hr'g Tr. 8:16–13:16, 14:15–18:17.) Appellant did not appeal the ruling of the Master and, therefore, she does not get to relitigate these issues here, under any "cause of action." (*See* Order Granting Summ. J. at ¶¶ 18–21, n.2.)

C. Public policy does not prevent the applicability of res judicata.

Appellant's final argument relates to public policy, which Appellant argues weighs in her favor. In this section, Appellant now relies on the fifth exception outlined in the Restatement (Second) of Judgments § 28(5)—the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties to the initial action. This exception does not apply here.

In reality, if there is any injustice resulting in this case it is to CitiMortgage for having to go through the time and expense associated with litigating "issues" that were previously litigated and "claims" that are precluded due to Appellant's default in the prior foreclosure action. To allow Appellant to prevail on appeal would result in disgruntled litigants ignoring the South Carolina Rules of Civil Procedure, ignoring the Appellate Court Rules, and relitigating issues and claims that were properly decided in a previous

[32] CitiMortgage notes that these allegations regarding submission of payments and the foreclosure suit are nothing more than a continuation of an already existing "claim," as Appellant's own Initial Brief makes clear. Appellant asserts in her recitation of the facts that when CitiMortgage filed the foreclosure suit she "immediately contacted" CitiMortgage who at that time assured her that the foreclosure suit would be dismissed if she provided payments. (*See* App.'s Initial Brief at p.7.) Thus, Appellant's claim arising from this promise arose at that time—prior to the date for compulsory counterclaims—not when CitiMortgage allegedly repeated the promise later.

action without using the proper mechanism—through an appeal of that decision. This is not the law in South Carolina, and no last-ditch plea to the contrary is going to change that for Appellant.

Appellant now claims that CitiMortgage's "unfair practices and procedures in connection with loan servicing and foreclosures"—the ones that Appellant had insufficient evidence and testimony to prove during her Rule 60(b) Motion—violates some unspecified "state policy." Apparently, under Appellant's theory, any allegedly improper conduct, which could form the basis of a claim for relief, is sufficient reason to set aside well-established and important principles of judicial economy and fairness to the opposing litigant. In coming to this conclusion, Appellant ignores the fact that any "public policy" exception to the applicability of preclusion principles has been applied very narrowly and only to collateral estoppel.[33]

In *Nelson v. QHG of S.C., Inc.*, 362 S.C. 421, 427, 608 S.E.2d 885, 859 (2005), the South Carolina Supreme Court applied collateral estoppel to prevent a grandfather from pursuing a medical malpractice claim after the mother sued the doctor on the same claim. While the grandfather argued that the ruling would "preclude an innocent minor's action against the Doctors," thereby "violat[ing] principles of fundamental fairness," the South Carolina Supreme Court disagreed holding that "[u]nder the circumstances of this case, Grandfather's policy considerations ***do not override the interest of bringing an end***

[33] This Court has held that there is no "binding authority recognizing a [public policy] exception for res judicata." *S.C. Pub. Interest Found.*, 2012 S.C. App. LEXIS at *24. "Rather, the doctrine of res judicata itself is a doctrine founded upon the objective of preserving and protecting public interest." *Id.* at *24–25. The "public interest would not be served by allowing [Appellant] . . . to have another bite at the apple." *Id.* at *23. Creation of such a public interest exception would "swallow the rule of res judicata" and "could be used in any case in which the court expresses moral indignation over the outcome, regardless of the plaintiff's failure to demonstrate truly extraordinary circumstances justifying a departure from res judicata." *Id.* at *29. Appellant's default in the prior foreclosure action and failure to appeal the Master's denial of her Rule 60(b) motion certainly does not provide any "extraordinary circumstances."

to litigation and the interest of ensuring a defendant is not being forced to defend the same action repeatedly." *Id.* (emphasis added). Instead, the Court instructed that the proper "remedy is a malpractice action against the former counsel." *Id.* Therefore, if the strong public interest in protecting minor children, who cannot protect themselves, is insufficient to defeat preclusion, the alleged "public policy" in this case is insufficient.

Appellant goes so far as to make the obscenely offensive and bold statement that "[h]ad either Administrative Order been in force prior to the judicial sale of the subject property, Appellant would not have lost her property." (App.'s Initial Br. at p.38.)[34] While CitiMortgage is unclear how Appellant has the ability to go back in time and make such a prediction, the statement is left unsupported by any case law or any citations to the record, and, therefore, is evidence of Appellant's intent to continually litigate this case until she obtains a desirable outcome. Public policy favors an end to this litigation that has dragged on at the whim of Appellant for years. *See Wright*, 317 S.C. at 163, 452 S.E.2d at 14 ("The doctrine of res judicata originates from the principles that public interest requires an end to litigation.") (citation omitted).

D. The Lower Court's ruling is on point with well-established law.

Finally, the South Carolina Supreme Court has previously considered a situation strikingly similar to the one presented here and ruled in favor of the foreclosing entity pursuant to the doctrine of res judicata. *See Antrum v. Hartsville Production Credit Ass'n*, 228 S.C. 201, 89 S.E.2d 376 (1955). There, Hartsville Production commenced a foreclosure action against Antrum, who defaulted in the foreclosure action and an order

[34] Not only is it entirely speculative that South Carolina Supreme Court Administrative Order No. 2011-05-02-01 would result in a resolution of the foreclosure action, even going back in time and assuming all facts are the same, Appellant through her default in the foreclosure action would have also necessarily failed to elect participation in foreclosure intervention within the thirty days outlined in the Administrative Order.

was entered against him on June 13, 1949. *Id.* at 204, 89 S.E.2d at 377.[35] Antrum refused to vacate the property and a rule to show cause was issued requiring him to show cause why a writ of assistance should not be issued directing the sheriff to evict him from the property. By analogy, the rule to show cause hearing in the *Antrum* case was just like Appellant's Rule 60(b) arguments—a hearing held during the action, post-judgment, in which the parties argued why the judgment should not be enforced. During the rule to show cause hearing, the judge heard Antrum's arguments and held them insufficient in an order dated January 7, 1950. From that order, "no appeal was taken." *Id.* at 206, 89 S.E.2d at 378.[36]

On December 23, 1953, three years after the order on the rule to show cause hearing, Antrum filed a petition, naming both Hartsville Production and Hawkins, which asked that the foreclosure sale be set aside and the master's deed to be declared void—exactly like Appellant's independent action filed years later in this case. *See id.* In the petition, Antrum argued he was "lulled" into a "false sense of security at the sale,"[37] the mortgage was obtained by fraud, the foreclosure proceedings themselves were "indicative of fraud,"[38] and the amount of the secured debt was improperly stated in the complaint for foreclosure, to name a few. *Id.* In response, Hartsville Production argued that the petition was barred by res judicata. The court agreed. *See id.* at 208, 89 S.E.2d at 379. Following this ruling, Antrum appealed.

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[35]Antrum was the highest bidder, but did not have sufficient cash to pay the deposit, so the property was sold to Marion Hawkins. In this case, the property was sold to Stonegate at the foreclosure sale, another defendant in the trial court action.

[36]Just as Antrum failed to appeal the ruling on the rule to show cause hearing, Appellant failed to appeal the ruling on her Rule 60(b) Motion.

[37] Similar to Appellant's assertion and arguments before the Master that she was led to believe the foreclosure action would be dismissed if certain payments were made—testimony that the Master found unsupported by the record.

[38] Again, similar to Appellant's arguments of fraudulent servicing of her loan.

On appeal the South Carolina Supreme Court focused on the doctrine of res judicata as a "fundamental rule of our jurisprudence." *Id.* at 209, 89 S.E.2d at 379.

> [Res judicata] rests upon the ***sound principle of public policy*** that after final decision of a controversy by a court of competent jurisdiction the party against whom the decision was rendered, and those in privity with him, ***should not be permitted again to litigate*** against the successful party or those in privity with him, the issues that were there decided. While the doctrine has been generally said to bar relitigation not only of issues actually decided in the former proceeding, but also of such issues as could have been there presented for decision, the application of the defensive bar to the latter rests, strictly speaking, upon the doctrine of estoppel rather than res judicata.

Id. at 209, 89 S.E.2d at 379–80 (emphasis added, citation omitted). The South Carolina Supreme Court emphasized that the issue before court on the writ of assistance "was the validity of the foreclosure sale." *Id.* Antrum contended that the "sale was invalid" and "the matter was decided adversely to him." *Id.* Again, he did not appeal this ruling. The next discussion by the South Carolina Supreme Court is instructive here:

> Nearly four years later he filed his present petition, contending that the foreclosure sale was invalid upon the same ground that he had advanced in the proceeding for the writ of assistance, and upon several other grounds, hereinbefore set forth, all of which must have been as well known to him then as they are now. Two of them, to wit: the contention that the chattel mortgage should have been first foreclosed, and the claim that the real estate mortgage had been obtained by fraud, forgery and deceit, go to the merits of the foreclosure proceeding rather than to the validity of the sale itself. They should have been pleaded by way of answer to the complaint in the foreclosure. But the defendant let the case go by default, and he made no application within the prescribed time to have the judgment vacated because of mistake, inadvertence, surprise or excusable neglect.

Id. at 210, 89 S.E.2d at 380 (citation omitted).[39] Here, just as in *Antrum*, there is no question that the issues outlined throughout this brief were considered and decided by the Master and Appellant's claims for damages are barred by res judicata due to their compulsory nature and her prior default.

Further, in that case, the judge during the rule to show cause hearing did not take testimony as the Master did during Appellant's Rule 60(b) hearing. However, even without the testimony, the South Carolina Supreme Court did "not agree with appellant's suggestion that since no testimony was taken on the rule to show cause, [the judge's] order of January 7, 1950, was not an adjudication of the merits and therefore should not be held to bar the instant proceeding." *Id.* This statement cannot be a clearer dagger through the heart of Appellant's "actually litigated" argument referenced in Section V(B)(ii), *supra*. If written briefing on a rule to show cause hearing, without testimony, is sufficient to be an adjudication on the merits, the hearing before the Master in this case where documentary evidence was presented, and testimony was taken, is certainly sufficient to establish this requirement. (6/8/09 Order at p.1.) Thus, just as in *Antrum*, the "order, which adjudged appellant's return insufficient on its face, was a final determination of the controversy, having precisely the same effect as an order sustaining by demurrer to a pleading" and, "[a]s to it, ***appellant's remedy was by appeal***." *Id.* (emphasis added); (*see* Order Granting Summ. J. at n.2.) Therefore, the closing by the Court could not be more applicable:

> It may be, as appellant suggests, that he would have fared better had he not been advised to permit the foreclosure to proceed uncontested. And we are not insensible to his lament that ever since the foreclosure sale he has, until his

[39] Appellant did file a Rule 60(b) Motion that was heard and decided by the Master, thereby making this an even stronger case for the applicability of res judicata and collateral estoppel.

> present counsel took his case, sought representation in vain.[40] But such considerations cannot avail against the fundamental legal principles to which we have referred. The judgment of foreclosure and the order directing the issuance of the writ of assistance ***constitute an insuperable bar to the present proceeding***.

Id. (emphasis added). Here, as outlined in this brief, Appellant's arguments are unavailing and cannot overcome the "insuperable bar" created by her own default and arguing these issues before the Master several years ago.

VII. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF CITIMORTGAGE SHOULD BE AFFIRMED ON SEVERAL ADDITIONAL SUSTAINING GROUNDS.

In addition to affirming the trial court's ruling on res judicata and collateral estoppel, there are additional sustaining grounds[41] for many of Appellant's claims. Rule 220(c), SCACR provides the court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Accordingly, a "respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

A. Applicability of the Economic Loss Rule.

One additional reason to affirm the trial court's dismissal of the negligence and negligent misrepresentation claims is the applicability of the economic loss rule. Under South Carolina law, the economic loss rule bars recovery in tort for purely economic

[40]CitiMortgage notes that Appellant was represented by counsel during her Rule 60(b) proceeding and is represented by counsel in this proceeding.

[41]Because the documents attached to CitiMortgage's Motion to Dismiss were all matters of public record related to the prior foreclosure action referenced by Appellant in her Complaint, this Court may construe the ruling as one pursuant to S.C. R. Civ. P. 12(b)(6).

losses when the alleged damages arise from the purported breach of contractual duties. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989). Appellant's allegations in the Complaint evidence the applicability of the economic loss rule as a bar to her negligence and negligent misrepresentation claims. (*See* Compl. ¶¶ 45, 111). Appellant's allegations in the negligence and negligent misrepresentation claims are improper attempts to disguise a purely contractual dispute—allegedly improper servicing—as tort claims. *See Sharpe v. Household Fin. Corp. II*, No. 8:09-cv-02784, 2010 U.S. Dist. LEXIS 105235, at *8–9 (D.S.C. Sept. 30, 2010). Based on the foregoing, the economic loss rule serves as an additional sustaining ground to dismissal of the negligence and negligent misrepresentation claims.

B. Appellant Lacks Standing to Challenge the Mortgage Assignment.

As noted in footnote 5, *supra*, Appellant is not challenging the trial court's ruling on several of her claims related to the prior foreclosure and, therefore, the trial court's ruling on these issues, including Appellant's standing to challenge the mortgage assignment, is the law of the case. To the extent this Court considers this claim (*See* Compl. ¶¶ 61–63), the trial court's ruling on this claim can be affirmed due to Appellant's lack of standing to challenge the mortgage assignment.

The standing argument fails as a matter of law because Appellant was the borrower, not a party to the assignment. As outlined in CitiMortgage's Memorandum in Support of Motion to Dismiss, courts considering this issue have consistently held that a borrower lacks standing to challenge the assignment. *See, e.g., Williams v. U.S. Bank Nat'l Ass'n*, No. 10-14967, 2011 U.S. Dist. LEXIS 62047, at *3–4 (E.D. Mich. June 9, 2011); *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*,

339 Fed. Appx. 97, 102 (6th Cir. 2010); *Blackford v. Westchester F. Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900) ("As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so."). Based on the foregoing, Appellant as a third-party to the mortgage assignment, lacks standing to challenge its validity, and this reasoning serves as an additional sustaining ground.

C. The Statutes of Limitation Bar Appellant's Claims to the Extent they Rely on Actions Taken Prior to June 21, 2008.

As acknowledge by Appellant, many of the events underlying her claims for damages occurred between February 12, 2008 and June 16, 2008—many predating the institution of the foreclosure action—and, therefore, to the extent her claims for negligence, fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, alleged violation of the SCUTPA, tortious interference with contract, and negligent misrepresentation rely on those factual allegations, they are barred by the three year statutes of limitation. (*See* App.'s Initial Br. at pp.6–8; *see also* Compl. ¶¶ 6–24.).

Each of Appellant's claims for damages has a three year statute of limitations. *See, e.g.,* S.C. Code Ann. § 15-3-530; S.C. Code Ann. § 39-5-150. Accordingly, Appellant should have brought any claims related to actions within three years prior to the institution of the foreclosure in 2008. Instead, Appellant defaulted in the foreclosure action, unsuccessfully litigated a Rule 60(b) Motion, and then decided to pursue her alleged claims years later in the instant action. Appellant's failure to assert these claims within the three year statutory period is improper and, therefore, an additional sustaining ground exists for dismissal of the claims as untimely.

CONCLUSION

CitiMortgage respectfully requests dismissal of the appeal for failure of Appellant to timely serve her notice of appeal. However, even if the Court considers the arguments on appeal, the lower court's ruling granting summary judgment in favor of CitiMortgage on the grounds of res judicata and collateral estoppel was proper. Reversal is not warranted.

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In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Case No. 2011-CP-08-1754

CitiMortgage, Inc., ... Respondent,

v.

Angela Drexler, ... 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 Initial Brief of Respondent by mailing a copy of same by United States Mail, postage prepaid to the following addresses:

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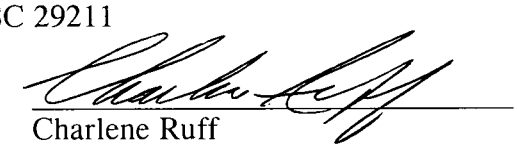

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September 27, 2012