THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon
Circuit Court Judge

Appellate Case No. 2016-001861
Court of Appeals Opinion 2016-UP-263
Circuit Court Case No. 2011-CP-29-00873

Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, N.A.,	Respondent,
v.	
Ronald P. Pappas, a/k/a Ronald Peter Pappas, and Camine Pappas,	Petitioners,
and	
Ronald P. Pappas, a/k/a Ronald Peter Pappas, and Camine Pappas,	Cross-Plaintiffs
v.	
Wells Fargo Bank, N.A. and Craft Development, LLC, a North Carolina Limited Liability Company,	Cross-Defendants.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

A case must clear a high hurdle in order to merit this Court's attention through a certiorari petition. For one, it must raise a novel question of law, or conflict with this Court's prior precedent, or involve a substantial constitutional question, or have other "special and important reasons" that warrant Supreme Court involvement. Rule 242(b), SCACR. Likewise, the petition itself must adhere to a rigorous protocol in order to even be considered. *See id.* 242(d)(4) ("Failure of a petition to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.").

Both this case and the Pappases' petition fall far short of the heavy standards for certiorari review. Nowhere in their petition do the Pappases identify any unresolved legal issue that they wish for this Court to take up. Nor do they identify anything within the Court of Appeals' *per curiam*, unanimous, unpublished decision that conflicts with any prior decision of this Court. Nor do they even identify what legal questions they want the Court to consider, as required by Rule 242(d)(2).

Instead, the Pappases devote their entire petition to arguing a point of discovery that South Carolina jurisprudence has consistently rejected: that they are entitled to forestall summary judgment in order to engage in additional discovery that, as a matter of law, cannot resuscitate defective claims. The Court of Appeals correctly dismissed the Pappases' arguments in summary fashion, and that ruling does not warrant certiorari review. Accordingly, the Court should deny the Pappases' petition and allow this 2011 case to move to final judgment without further delay.

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

As noted above, the Pappases have not stated any particular question on which they seek certiorari review by this Court, as required by Rule 242(d)(2), SCACR. To the extent such a question is discernible from their petition, Wells Fargo understands the issue as follows:

> After a two-year discovery period, can a plaintiff avoid summary judgment on claims of fraud and unfair trade practices by seeking additional discovery regarding a single document on which the plaintiff concedes he never relied when entering the underlying transaction?

South Carolina law has repeatedly answered this question "No," and there is no reason for this Court to review the Court of Appeals' correct application of hornbook law.

COUNTERSTATEMENT OF THE CASE

Mr. Pappas characterizes himself as being in the "real estate development business." (Appx. p. 597, at 14:2.) He has worked for two national homebuilding companies, he operates his own residential development business, and he has served as member of the Lancaster County Planning Commission. (Appx. pp. 597–98, at 13:13–14:21, 16:23–17:23.)

In March 2006, Mr. Pappas entered into a contract with Craft Development to purchase an undeveloped lot in a new subdivision in Lancaster County for $229,000, of which Mr. Pappas planned to finance $206,100. (Appx. p. 175.) The sales contract was not contingent on the lot appraising for any particular value. (Appx. pp. 175–81.) Wachovia Bank (or its successor by merger, Wells Fargo) was not a party to the sales contract, nor did it participate in negotiating the purchase price. (Appx. pp. 599–600, at 23:5–:10, 27:23–28:6.)

Two months after entering the sales contract, the Pappases entered into a three-year loan agreement with Wachovia Bank for $206,100 that was secured by a mortgage on Mr. Pappas's new lot. (Appx. p. 302.) Just as with the sales contract, the loan agreement did not make any representations about any appraisals done on the property.

Rather than paying off their 2006 note when it came due, the Pappases approached Wachovia Bank about refinancing their debt. (Appx. p. 608, at 57:8–:10.) On July 22, 2009, the parties entered a new three-year note in the principal sum of $210,954.69. (Appx. p. 183.) Once again, this note was secured by a mortgage on Mr. Pappas's undeveloped lot. (Appx. p. 190.) And once again, the loan materials did not make any representations regarding any appraisal of the property, nor was the refinance contingent upon any appraised value of the lot. (Appx. pp. 183–88, 190–203.)

In January 2011—nearly six years ago—the Pappases stopped making payments on their 2009 refinanced note. (Appx. pp. 608–09, at 60:16–61:7.) Wells Fargo commenced this foreclosure action on June 20, 2011. (Appx. p. 13.) In September 2011, the Pappases responded with a series of counterclaims and a third-party complaint against Craft Development. (Appx. p. 31.) The counterclaims included alleged violations of the South Carolina Unfair Trade Practices Act, the Real Estate Settlement Procedures Act, and the Interstate Land Sales Full Disclosure Act, as well as fraud and negligent misrepresentation. (Appx. pp. 33–41.)

In December 2013—over two years after the Pappases asserted their counterclaims, and after undertaking a fully battery of discovery—Wells Fargo moved for summary judgment on its foreclosure claim and on the Pappases' counterclaims. (Appx. p. 148.) In opposing summary judgment, the Pappases did not present any substantive arguments, but instead submitted a Rule 56(f) affidavit from their counsel requesting that even more discovery take place with respect to an appraisal done in connection with the 2009 refinancing agreement. (Appx. p. 266.) Nowhere in that affidavit is there any explanation as to what relevance that appraisal could have as to their claims, as there is no dispute that the Pappases never saw or relied on that appraisal when refinancing their debt.

Judge McMahon heard oral arguments regarding Wells Fargo's motion for summary judgment on February 18, 2014. During that hearing, the Pappases withdrew their counterclaims based on federal statutes. (Appx. p. 575, at 26:8–:10.) At the close of arguments, Judge McMahon orally granted judgment in Wells Fargo's favor on the remaining claims. (Appx. pp. 586–87, at 37:12–38:18.) He memorialized his ruling by written order entered on April 11, 2014. (Appx. p. 1.)

The Pappases appealed Judge McMahon's summary judgment order, arguing that judgment was entered prematurely and that they should be entitled to additional discovery regarding an appraisal associated with their 2009 refinancing. (Appx. p. 641.) But because they concede they never saw or relied on that appraisal, it is immaterial to their claims, and the Court of Appeals so held via an unpublished *per curiam* opinion on June 8, 2016. (Appx. p. 687.)

On June 22, 2016, the Pappases sought rehearing with the Court of Appeals. (Appx. p. 690.) The Court of Appeals denied rehearing on August 18, 2016. (Appx. p. 698.) This certiorari request followed, and should likewise be summarily denied.

ARGUMENTS AND AUTHORITIES

I. There is nothing unique about this case that warrants certiorari review, and this Court previously rejected certiorari in an indistinguishable case.

Both the Appellate Court Rules and this Court's precedent make clear that certiorari review is the exception, not the rule, and that it is only available in cases that present unique or meaningful issues. *See, e.g.*, *State v. Lyles*, 381 S.C. 442, 443–44, 673 S.E.2d 811, 812 (2009) (emphasizing that certiorari review is available "only where special reasons justify the exercise of that power"); Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons."). This case falls far short of this high threshold.

At most, this case involves a routine application of the rules of discovery and the well-established requirements for claims of fraud and unfair trade practices. On both of these points, the Pappases' claims and arguments failed here for the exact same reasons the borrowers' claims failed in *Robertson v. First Union National Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002).

In *Robertson*, as here, the borrowers financed the purchase of real estate through a mortgage on the property. *Id.* at 344, 565 S.E.2d at 312. There, as here, the borrowers later claimed that their property was not worth what was reflected in an appraisal performed in connection with their loan. *Id.* at 347–48, 565 S.E.2d at 313–14. And there, as here, the borrowers conceded that they did not review or rely on the appraisal when closing their property purchase. *Id.* at 348, 565 S.E.2d at 314.

These core facts prompted the *Robertson* court to affirm summary judgment in the bank's favor on claims of fraud and negligent misrepresentation due to the absence of any reliance on the appraisal, and on the unfair trade practices claim due to the absence of any discernible unfair or deceptive business conduct that could affect the public interest. *Id.* at 348–51, 565 S.E.2d at 314–15. Because their claims were legally defective, the *Robertson* court also rejected those borrowers' attempt to stave off summary judgment by seeking additional discovery. *Id.* at 346–47, 565 S.E.2d at 313.

The instant case is in lockstep with *Robertson* in every material respect: the same key facts, the same defective claims against a lender, and the same empty discovery-based arguments to avoid summary judgment. Accordingly, it is no surprise that the Court of Appeals affirmed summary judgment in Wells Fargo's favor on the exact same grounds cited in *Robertson*. (Appx. p. 688.)

This Court ultimately determined that the *Robertson* opinion did not merit certiorari review. *See Robertson v. First Union Nat'l Bank*, 357 S.C. 191, 192, 592 S.E.2d 625, 626 (2004) ("After careful consideration, we dismiss certiorari as improvidently granted.").[1] It should reach the same conclusion here and deny the Pappases' request, as there is nothing unique or peculiar about the facts or the law in this case to warrant certiorari review.

II. The Court of Appeals' opinion is correct in every respect.

In addition to not warranting certiorari review, the Court should deny the Pappases' petition because the Court of Appeals' opinion accurately assessed the law governing this case.

Fraud/Negligent Misrepresentation: South Carolina law is settled that claims of fraud and negligent misrepresentation require a party to prove that it reasonably relied on another's false statement in order to sustain such a claim. *See, e.g.*, *Schnellmann v. Roettger*, 373 S.C. 379, 383, 645 S.E.2d 239, 241 (2007) (affirming summary judgment on claims of fraud and negligent misrepresentation because the plaintiffs "did not justifiably rely on respondent's representation").

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[1] After then-Chief Judge Hearn authored *Robertson*, it has been cited by numerous federal courts as accurately stating the law of South Carolina with respect to the same issues for which Wells Fargo cites it in this case. *See, e.g.*, *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 434 (4th Cir. 2003) (citing *Robertson* for the statement "[i]ndisputably, negligent misrepresentation and fraud require proof of reliance"); *Morgan v. HSBC Bank USA*, Case No. 6:13-cv-03593-JMC, 2015 U.S. Dist. LEXIS 81687, at *11 (D.S.C. June 24, 2015) (citing *Robertson* for the statement "[c]onduct that affects only the parties to the transaction provides no basis for a SCUTPA claim"); *Thompson v. Bank of Am.*, Case No. 7:09-CV-89-H, 2011 U.S. Dist. LEXIS 109660, at *39 (E.D.N.C. Feb. 24, 2011) ("The *Robertson* court held that a bank funding an under-collateralized loan and allegedly violating its internal loan procedures did not violate SCUTPA because the actions 'would only cause harm to Bank, for it could find itself potentially obligated on a loan it would not otherwise make.'" (quoting 350 S.C. at 351 n.2, 565 S.E.2d at 315 n.2)); *Feeley v. Total Realty Mgmt.*, 660 F. Supp. 2d 700, 715 (E.D. Va. 2009) ("In a factually similar case, the Court of Appeals of South Carolina affirmed a trial court determination that allegations that a bank allegedly made loans secured by insufficient collateral did not constitute an unfair act or practice that affected the public interest. This Court adopts the analysis of the *Robertson* court.").

Because the Pappases concede that they never reviewed any appraisal in connection with their 2009 refinancing, their claims of fraud and negligent misrepresentation fail as a matter of law for want of justifiable reliance, just as the Court of Appeals held. (*See* Appx. p. 688 (citing *Schnellmann* (reliance as an element of fraud) and *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992) (reliance as an element of negligent misrepresentation)).)

Failure to Undertake Self-Help: Similarly, South Carolina law is clear that parties are barred from recovery on fraud-based claims when they could have ascertained relevant information on their own but did not do so. *See, e.g.*, *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 241, 692 S.E.2d 499, 509 (2010) (granting judgment against a purchaser on a claim for negligent misrepresentation arising out of a zoning discrepancy because "Quail Hill could have reviewed the Official Zoning Map to ascertain the correct zoning classification").

The Pappases admit that they were not prevented from "independently ascertaining the value" of the subject property, but they never commissioned their own appraisal. (Appx. p. 263, at ¶ 13.) Accordingly, their claims of fraud and negligent misrepresentation fail for this additional reason, just as the Court of Appeals held. (*See* Appx. p. 688 (citing *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984), for the proposition that "[t]he court will not protect the person who, with full opportunity to do so, will not protect himself").)

Unfair Trade Practices: The South Carolina Unfair Trade Practices act penalizes business conduct that is (1) "unfair or deceptive" and (2) adversely affects the public interest. *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 628, 743 S.E.2d 808, 816 (2013).

The Pappases argue that the 2009 appraisal might demonstrate that Wells Fargo secured their refinancing with insufficient collateral, and they speculate that their 2009 loan agreement

resulted from this assumed trade practice. (Pet. for Writ of Cert. at 12.)[2] But this exact argument has been addressed and rejected by South Carolina's courts. *See Robertson*, 350 S.C. at 351, 565 S.E.2d at 315 ("[W]e can think of no logical reason why Bank would make it a practice to intentionally make loans for an amount in excess of the collateral's value and risk substantial losses in the event of default. Therefore, summary judgment on this issue was proper."). The Pappases' unfair trade practices claim fails accordingly, just as the Court of Appeals held. (*See* Appx. p. 688 (citing *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994), for the proposition that "[t]o be actionable under the [South Carolina Unfair Trade Practices Act], an unfair or deceptive practice or act must adversely affect the public interest") (second set of brackets supplied by the Court of Appeals).)

No Need for Additional Discovery: Summary judgment is available any time after a case has been pending for 30 days. Rule 56(a), SCRCP. The need for additional discovery can only stall entry of summary judgment when a party opposing summary judgment presents via affidavit an explanation of additional discovery that it needs to undertake in order to support its opposition. *Id.* 56(f). However, any proposed additional discovery must bear on dispositive issues. *See, e.g.*, *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("[T]he nonmoving party must demonstrate the likelihood that further discovery will uncover additional ***relevant*** evidence and that the party is 'not merely engaged in a "fishing expedition."'" (quoting *Baughman v. AT&T Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991))) (emphasis added).

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[2] In their petition, the Pappases now suggest that they may have been charged for an appraisal in 2009 that was never performed. (Pet. for Writ of Cert. at 12.) In addition to being false, this was never a theory of their case before the circuit court, and cannot be asserted on appeal. *See, e.g.*, *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510–11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

This is the fundamental defect in the Pappases' argument. They claim that they need a copy of the appraisal supporting the 2009 refinancing—for which they never actually served a document request—in order to oppose summary judgment, but they fail to explain how that appraisal can revive their claims. Indeed, it cannot, as the Pappases concede that they did not rely on it when refinancing a debt that they already owed. Accordingly, their efforts at additional discovery are futile, just as the Court of Appeals held on this final issue. (*See* Appx. p. 688 (citing *Dawkins* and *McCall v. Finley*, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987), for the proposition that discovery must be relevant to avoid summary judgment).)

CONCLUSION

Because this case does not meet any of the criteria for granting certiorari, and because the Pappases have not even identified the questions on which they seek this Court's review, the Court should deny their petition for a writ of certiorari and remit this matter back to the circuit court to enforce its judgment.

Respectfully submitted,

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PROOF OF SERVICE

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

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