THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Judge

Appellate Case No. 2014-001766

Wells Fargo Bank, N.A.,.....Respondent,

v.

Gisela B. Moore, Thomas J. Moore a/k/a Tom J. Moore, and John Moore, Appellants.

PETITION FOR REHEARING OR REHEARING *EN BANC*

The Appellants (hereinafter "the Moores") hereby move and petition, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submit the memorandum below in support of the same. This court should not have affirmed the decision that was made below in favor of the Respondent (hereinafter "Wells Fargo"). The Moores incorporate the arguments set forth in their appellants' brief and reply brief in this appeal and further respectfully submit that the court may have overlooked or misapprehended certain points, as the following shows:

I. Affirming the circuit court means that the Moores – and, by extension, people in their position – have either only a limited recourse (offset) or no recourse against a foreclosure plaintiff for wrongs that foreclosure plaintiff has done to them.

The circuit court seemed to conflate the question of whether the effect of the Moores' success on their counterclaims may end up resulting only in an offset against Wells Fargo's claim with a different question, that of whether the counterclaims were actually only defenses. (R. pp. 3-4, p. 83 ln. 7-8.) This court affirmed the decision produced by that flawed analysis. What the circuit court threw out on the basis that they are only defenses are and always have been counterclaims. (R. pp. 3-4, 20-23, p. 83 ln. 7-8.) The Moores' counterclaims subject of this appeal are a claim for damages for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, a claim for damages for breach of contract, and a claim for damages for negligent misrepresentation. (R. pp. 20-24.) These are claims. The fact that they were raised by defendants and not plaintiffs does not lessen their status as claims. If they had been pled in a complaint, with the same facts pled, no one would doubt that they were claims. Under the South Carolina Rules of Civil Procedure, "each of the parties" – including a defendant – "is entitled to raise as many claims, independent or alternate, legal or equitable, as he has against the others[.]" Burnsed v. Greene, 291 S.C. 59, 60, 351 S.E.2d 910, 910-11 (Ct. App. 1986). This what Rule 13, SCRCP, provides.

The circuit court's reasoning for its decision, now affirmed, equated the proverbial apples and oranges. *Whether something is a counterclaim* is a different inquiry from *what the effect of success on the claim would be.* As discussed below, the record before the circuit court and this court showed the existence of genuine

issues of material fact precluding summary judgment as to each of the counterclaims subject of this appeal. The circuit judge acknowledged as much when he found "that there is a genuine issue of material fact as to whether the payment for $2,148.69 that Plaintiff received on August 25, 2011 was sufficient to bring the loan current" and found that "[r]egarding the counterclaims for unfair trade practices and negligent misrepresentation, based on the Affidavit of Thomas Moore, it appears that Defendants might be able to assert such claims against American Home Mortgage Network, Inc.[,]" the original lender in the subject mortgage loan. (R. p. 3.)

The circuit court saw those facts in the record; it just did not understand their significance. What drove the circuit court's decision and likely this court's decision were two misconceptions of law, discussed further in the next section of this petition: 1) that the counterclaims' potential to result in an offset against Wells Fargo's claim transformed the counterclaims into mere defenses and 2) that the Moores could not assert a counterclaim against Wells Fargo, which now claims to own the subject note and mortgage, based on conduct of the original lender.

These propositions are wrong on the law. From a policy perspective, too, though, it is wrong to hold that counterclaims raised by people in a position similar to the Moores are really only defenses. Say Wells Fargo fails to prove its claim, or the Moores get it thrown out at summary judgment. If the circuit court's decision stands, the Moores are just out of luck about the fact that Wells Fargo misappropriated large payments they made and never credited them to the subject account. They will be without recourse for that, all because they asserted that matter by way of counterclaims – something they are expressly allowed to do under Rule 13(a) and (b),

SCRCP – rather than bringing them in a separate action. They won't have the money, and they won't have any way to get a recovery for the fact that Wells Fargo essentially stole that money from them. That is not justice.

The Moores respectfully submit that this court overlooked or misapprehended the law in this regard.

II. This court's decision is inconsistent with existing precedent.

As discussed in the Moores' briefs, the circuit court's decision, now affirmed by this court, is inconsistent with existing precedent in this state, both with regard to the nature of counterclaims and about whether a defendant may assert a counterclaim against a plaintiff assignee.

Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986), does not stand for any proposition indicating that the Moores' claims arising from the originating lender's conduct cannot lie against Wells Fargo, which claims to be an assignee. Quite the opposite, actually.

Rosemond discusses common law principles that are the source of a note debtor's right to assert a counterclaim against an assignee that is based on the actions of the original lender, as shown in the emphasized quotation from Rosemond below:

> *At common law*, an assignee's rights can be no greater than those of his assignor. Dixie Wood Preserving Co. v. Albert Gersten & Associates, 244 S.C. 57, 135 S.E.2d 368 (1964). Consequently, the assignee of a debt takes the obligation subject to all *claims* and defenses the obligor may have against the assignor. Id. However, absent an agreement to the contrary, the common law assignee takes only the benefits, not the burdens of the assigned obligation. Koppers Company v. Kaiser Aluminum and Chemical Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970). Thus, as against the assignee, the obligor can only *assert a claim*

> defensively when the assignee seeks to enforce the obligation; he has no common law right to sue the assignee affirmatively on a claim against the assignor arising from the underlying obligation. Langel v. Betz, 250 N.Y. 159, 164 N.E. 890 (1928); Pargman v. Maguth, 2 N.J.Super. 33, 64 A.2d 456 (1949).

288 S.C. at 522-23 (emphasis added).

In Rosemond, this court recognized that existing and venerable common law principles permit a defendant to assert a claim defensively, i.e., assert a counterclaim, against an assignee plaintiff who sues him on a debt. Id. This court's opinion in the instant case does not purport to overrule Rosemond. Rosemond is the law. As long as Rosemond remains the law, it cannot be proper for this court to affirm the circuit court's following ruling:

> Regarding the counterclaims for unfair trade practices and negligent misrepresentation, based on the Affidavit of Thomas Moore, it appears that Defendants might be able to assert such claims against American Home Mortgage Network, Inc. However, there is nothing in the affidavits filed by Defendants that supports a claim for unfair trade practices or negligent misrepresentation against Plaintiff, so summary judgment on those causes of action is GRANTED.

(R. p. 3.)

Though the Moores' appellants' brief cites a number of authorities that demonstrate the wrongness of the circuit court's conceptions of the nature of counterclaims (Final Brief of Appellants pp. 9-11), the Moores point the court in particular to the Supreme Court of South Carolina's decision in Bank of Commerce of Charlotte v. Waters, 215 S.C. 543, 56 S.E.2d 350, 353-54 (1949), in which the Court quoted authority calling it "well settled that in action by an assignee, a claim in favor of defendant against assignor can be allowed as a set-off, *counterclaim* or

reconvention, only to the extent of the claim sued upon[.]" (Emphasis added). Though the case noted that, as against an assignee, a defendant could not achieve relief above that which would essentially cancel the plaintiff's claim against him, it also continues to refer to the defendant's counterclaim as a *counterclaim*; that the relief that might be achieved on it was limited to an offset did not turn the counterclaim into a *mere* defense. Id. The counterclaim retains its nature as a counterclaim. See id. The trial court's error in Bank of Commerce was to allow a judgment against the plaintiff on the counterclaim *above* the amount of the plaintiff's claim, since the plaintiff was an assignee. Id. at 353.

While Bank of Commerce alludes to a distinction between an "offset" and a "counterclaim[,]" id., after the adoption of the Rules of Civil Procedure in South Carolina, older perceived distinctions between an equitable set-off and a counterclaim seem to have been abrogated or abandoned as a result of the language of Rule 13(c), SCRCP. That Rule provides that "[a] counterclaim may or may not diminish or defeat the recovery sought by the opposing party." Rule 31(c), SCRCP. Since the adoption of the Rules of Civil Procedure, the old concepts of "offset" and "counterclaim" are now embraced within the definition of a counterclaim. Id.

This is borne out by decisions of our highest court since the adoption of the Rules of Civil Procedure. In 1997, the Supreme Court, quoting 20 Am.Jur.2d Counterclaim, Recoupment, & Setoff § 88 (1995), observed as follows:

> [T]he general rule concerning the effect of a setoff is that
>
> > a setoff . . . becomes part of a single controversy between the parties, requiring only one verdict and one judgment according to the facts.

> Generally, if an established setoff or counterclaim is less than the plaintiff's demand, the plaintiff has judgment for the residue only.

Brasington Tile Co. v. Worley, 327 S.C. 280, 286, 491 S.E.2d 244, 247 (1997). This passage illustrates that a counterclaim that ultimately results in an offset is not treated as though it stops being a counterclaim simply because its effect may be only to reduce the amount of the judgment in favor of the plaintiff. Id.

The decisions of the Supreme Court bind the Court of Appeals as precedents. S.C. Const. Art. V, § 9; Daniels v. City of Goose Creek, 314 S.C. 494, 497, 431 S.E.2d 256, 260 (Ct. App. 1993). The Moores respectfully note that this court's decision in the instant case does not comport with either Supreme Court precedent or precedent handed down by this court.

In 2012, this court noted

> that an award for setoff may exceed the underlying claim. This is correct under Rule 13, SCRCP, which states "[a] counterclaim *may or may not* diminish or defeat the recovery sought by the opposing party. It *may* claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." (emphasis added [by Court of Appeals]).

Wachovia Bank Nat'l. Ass'n. v. Beane, 397 S.C. 612, 619, 725 S.E.2d 715, 718 (Ct. App. 2012). Consistently with Rule 13, SCRCP, and this court's opinion in Beane, a counterclaim may diminish or defeat the plaintiff's recovery or it may not; however, regardless of whether success on the counterclaim ultimately produces only a setoff or produces a net judgment in favor of the defendant, it is still a counterclaim. Id.

The Moores respectfully submit that this court overlooked or misapprehended the law in this regard.

III. There are genuine issues of material fact that, by law, should have prevented the circuit court from granting summary judgment on the Moores' claims.

As discussed above and at greater length in the Moores' briefs, the record before the circuit court and this court showed the existence of genuine issues of material fact as to the Moores' breach of contract, SCUTPA, and negligent misrepresentation claims. As the circuit court ruled "there is a genuine issue of material fact as to whether the payment for $2,148.69 that Plaintiff received on August 25, 2011 was sufficient to bring the loan current" and "[r]egarding the counterclaims for unfair trade practices and negligent misrepresentation, based on the Affidavit of Thomas Moore, it appears that Defendants might be able to assert such claims against American Home Mortgage Network, Inc." (R. p. 3.) When the law is applied to the record, the grant of summary judgment cannot stand. What drove the circuit court's decision to grant summary judgment was not the absence of facts to support the Moores' claims; it was incorrect conceptions of the law about counterclaims.

The Moores respectfully submit that this court overlooked or misapprehended the law in this regard.

IV. Affirming the circuit court is a tacit endorsement of the unlawful idea that there is a presumption that a foreclosure plaintiff is entitled to win.

The undersigned counsel has practiced mortgage foreclosure law since the beginning of his career. Unfortunately, during that time, I have had many, many opportunities to notice that, in the courts of this state, there exists a perceived,

unwritten, and unspoken, though very consistently applied, presumption: that a mortgage foreclosure plaintiff is entitled to win its case, almost no matter what.

A basic problem with this presumption is that it does not really exist. There is no statute that creates such a presumption. There is no appellate opinion that says this presumption is a part of our law.

A plaintiff in a foreclosure action has the burden of establishing the existence and amount of a debt owed to it, its ownership of the mortgage securing that debt, and the debtor's default of the debt obligation entitling the plaintiff to foreclosure. See U.S. Bank Natl. Trust Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 205 (Ct. App. 2009). In accordance with the general principle that in a civil action the plaintiff bears the burden of proof, it is incumbent upon the party seeking foreclosure of a mortgage to prove all the elements of its case. See Baugh & Sons Co. v. Graham, 150 S.C. 398, 401, 148 S.E. 220 (1926) (plaintiff bears burden of proof in civil case). This is borne out by the authorities this court cited in footnote nine of the U.S. Bank opinion. 684 S.E.2d at 205 n. 9. That footnote reads as follows:

> See, e.g., Franklin Credit Mgmt. Corp. v. Nicholas, 73 Conn. App. 830, 812 A.2d 51, 57-58 (2002) ("In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note.") (internal quotations omitted) (internal citations omitted); Campaign v. Barba, 23 A.D.3d 327, 805 N.Y.S.2d 86, 86 (N.Y. App. Div. 2005) ("To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment."); In re Foreclosure of Real Prop. for $143,600.00, 156 N.C. App. 477, 577 S.E.2d 398, 406 (2003) ("In a foreclosure proceeding, the lender bears

> the burden of proving that there was a valid debt, default, right to foreclose under power of sale, and notice."); 55 Am. Jur. 2d Mortgages § 604 ("[T]he burden of proof of any particular issue rests upon the party asserting the affirmative of that issue under the pleadings."); cf. Paramount Fund, Inc. v. Cusaac, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984) (holding the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence).

U.S. Bank, 684 S.E.2d at 205 n. 9.

The circuit court seemed to assume that Wells Fargo was going to win its foreclosure case, so any misappropriation of money by Wells Fargo was just a defense by the Moores that could be taken care of through an offset in the inevitable judgment in Wells Fargo's favor. This court's decision to affirm a ruling underpinned by this thinking is a tacit endorsement of the notion that rulings in a foreclosure case can be properly made by assuming that victory for the plaintiff is certain to occur. Respectfully, by not checking this incorrect thinking on the part of the trial bench, this court, though probably not deliberately, has perpetuated it.

The almost universal application of this unwritten presumption has always baffled me. Banks don't need courts' help to get a fair shake in contested foreclosure cases. Well-heeled financial institutions have the money to pay for prosecuting their foreclosure suits, and their armies of lobbyists have so influenced the writing of statutory law that the scales are further tipped in their favor. One would think, too, that foreclosure – which usually means a South Carolina citizen's loss of his home – would be something to guard against, not something for a trial court to help along. The Roman poet and author Ovid is quoted as having said that "[t]he purpose of law is to prevent the strong always having their way."

The Moores respectfully submit that this court overlooked or misapprehended the law in this regard.

V. There is no analysis given in the opinion.

The court's opinion in this case is a memorandum opinion without explanation of the reasons for affirming the lower court, just a string of citations and parentheticals. The authority for doing that given in the opinion (as is given in many unpublished opinions issued by this court), is Rule 220(b), SCACR. That Rule states as follows:

> **(b) Decision by the Court.** In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case. This rule does not apply to the following:
>
> **(1)** *The Supreme Court* may file a memorandum opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, *the Supreme Court* determines that a published opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears.
>
> **(2)** The Court of Appeals need not address a point which is manifestly without merit.

Rule 220(b), SCACR (emphasis added).

Per Rule 220(b)(1), SCACR, it is only the Supreme Court that may issue a memorandum opinion that does not provide the reason for the appellate court's decision as to every point distinctly stated in the case. The undersigned respectfully submits that this is not a typographical error or an unthinking omission. Upon the invocation of the certiorari process, our Supreme Court may well have a need to know why this court decided an issue the way it did, so that the Supreme Court can fully evaluate whether certiorari is warranted.

The undersigned recognizes that this court has issued memorandum opinions without analysis like the one at issue here a great many times over many years. Certainly, "a long habit of not thinking a thing *wrong* gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defense of custom." Thomas Paine, Common Sense 45 (Edward Larkin, ed., Broadview Press 2004) (1776) (emphasis in original). That a thing, however, has long been done is not a substitute for its being correct. See id. This court's opinion does not meet the requirements of Rule 220(b), SCACR. An opinion that does should be issued.

The Moores respectfully submit that this court overlooked or misapprehended the law in this regard.

VI. Rehearing *en banc* would be proper.

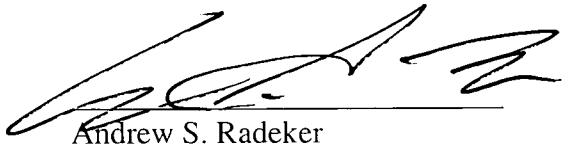
"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Consideration by the full court appears necessary to secure or maintain the uniformity of its decisions, as discussed above, including the decisions of Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986), in which this court explicitly recognized the right of a defendant to assert a claim against an assignee plaintiff based on the original lender's conduct, and Wachovia Bank Nat'l. Ass'n. v. Beane, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012), in which this court observed the potential for diminishment (offset) of a plaintiff's claim by a judgment on a *counterclaim*, like those pled here.

Exactly what "a question of exceptional importance" is for *en banc* purposes has not been a subject of much analysis in this state's jurisprudence. Whether the potential for offset against a foreclosure claim transforms a defendant's counterclaims into mere defenses, which contradicts the language of Rule 13, SCRCP, certainly appears to have a good chance at qualifying for that distinction.

WHEREFORE the Moores pray for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellants

December 15, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Judge

Appellate Case No. 2014-001766

Wells Fargo Bank, N.A.,.....Respondent,

v.

Gisela B. Moore, Thomas J. Moore a/k/a Tom J. Moore, and John Moore, Appellants.

PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing or rehearing *en banc* by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Thomas E. Lydon, Esq.
McAngus, Goudelock & Courie, LLP
P.O. Box 12519
Columbia, SC 29211

December 15, 2016

Andrew S. Radeker
S.C. Bar No. 73743
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellants

LAW OFFICES
HARRISON & RADEKER, P.A.
923 CALHOUN STREET
COLUMBIA, SOUTH CAROLINA 29201

James C. Harrison, Jr.*
Andrew S. Radeker
Taylor M. Smith IV

* Mediator/Arbitrator

P.O. Box 50143
Columbia, SC 29250

(803) 779-2211
(803) 779-6700 (FAX)

December 15, 2016

VIA HAND DELIVERY
The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
1220 Senate Street
Columbia, South Carolina 29201

Re: Wells Fargo Bank, N.A. v. Gisela B. Moore, et al.
Appellate Case No. 2014-001766

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of a petition for rehearing or rehearing *en banc*, with attached proof of service thereof. Also enclosed is this firm's check in the amount of $25.00 as the motion fee.

Kindly file these documents and return a file-stamped copy thereof to the bearer of this letter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.

Andrew S. Radeker

ASR/

Enclosures

cc: Thomas E. Lydon, Esq.