THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-in-Equity

Joseph M. Strickland, Master

Appellate Case No. 2015-000367
Case No. 2012-CP-40-7878

Royals Portfolio, LLC, as assignee of Bank of America, N.A., formerly known as NationsBank, N.A., which is Successor by Merger to NCNB South Carolina, ...Respondent,

v.

Charlie Kelly and Dorothy Simpson,..... Appellants.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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2. The Chief Justice of the South Carolina Supreme Court did not intend to create and did not create a new state law right to foreclosure intervention in Administrative Order 2011-05-02-01.

3. The trial court correctly found that Administrative Order 2011-05-02-01 did not grant any foreclosure intervention rights to Appellants.

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6. Appellants' arguments that Administrative Order 2011-05-02-01 granted them a right to foreclosure intervention are barred by the law of the case doctrine.

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8. As an additional sustaining ground, the trial court erred in excluding the affidavit of Robert Eisman (with exhibits), and this evidence demonstrates that Royals complied with the requirements of Administrative Order 2011-05-02-01.

STATEMENT OF THE CASE

This is a mortgage foreclosure case. The Respondent (Royals) is the mortgagee. The Appellants (Debtors) are the mortgagors. The trial court granted foreclosure and ordered the sale of the mortgaged property under the following rulings: (1) Debtors had defaulted on the note and mortgage; (2) the total secured debt was approximately $318,000.00; (3) Royals was entitled to an award of fees and costs for approximately $41,000.00; and (4) the total foreclosure debt was $359,372.63.[1] Debtors do not challenge these rulings on appeal, thereby making them the law of this case.

After the close of the evidence in the foreclosure action, Debtors moved to stay the foreclosure action, contending that Royals had deprived Debtors of their state law right to "foreclosure intervention." The trial court denied this motion in a separate order. Debtors timely appealed both orders without first making a 59(e) motion, but their appeal is limited to the issue of a state law right to "foreclosure intervention."

The fundamental issue in this appeal is the meaning of Administrative Order 2011-05-02-01 (the 2011 Order or 2011 Administrative Order). Debtors contend that the 2011 Order created a new state law right to "foreclosure intervention." Royals contends that an administrative order cannot create a new state law right and, in any event, the 2011 Order did not create a new state law right to "foreclosure intervention."

[1] Merits Order at 8-9, ¶¶ 45-56; and at 11, ¶¶ 61-62.

FORECLOSURE INTERVENTION

In 2009, the federal government granted certain homeowners a federal right to "foreclosure intervention" under the newly created Home Affordable Modification Program (the HMP). This federal right was limited to loans guaranteed by Fannie Mae or Freddie Mac, and other home loans held by lenders that had agreed in writing to participate in the HMP. The goal of the HMP was to avoid pending and future foreclosures of HMP loans by requiring HMP lenders to engage in a process governed by published federal guidelines aimed at restructuring the underlying loan. Here, it is undisputed that Debtors do not qualify for this federal right – the loan at issue is not a Fannie Mae or Freddie Mac loan, and Royals has never agreed to participate in the HMP. (For more details on this, see Arg. II, *infra*).

In May 2009, Fannie Mae moved in the original jurisdiction of the South Carolina Supreme Court for an emergency TRO staying all pending and future foreclosure sales of properties involving a Fannie Mae loan, so that the parties to those foreclosure actions could address the newly created federal right to "foreclosure intervention." The Chief Justice granted the TRO and later replaced it with Administrative Order 2009-05-22-01 (the 2009 Order or 2009 Administrative Order). The 2009 Order set forth a process for administering the federal right to "foreclosure intervention" in South Carolina state court foreclosure proceedings. Two years later, the Chief Justice issued the 2011 Administrative Order for the express purpose of addressing difficulties that had arisen in administering the federal right to "foreclosure intervention" under the 2009 Administrative Order. Debtors contend that the 2011 Order also created a new state law right to "foreclosure intervention." (For more details on this, see Arg. II, *infra*).

BACKGROUND FACTS and PROCEDURAL HISTORY

The note and mortgage at issue here originated in a commercial loan in September 1989 from a third-party bank to Pinewood Care, an assisted living care facility.[2] In 1993, the note-holder made an additional loan under another commercial note and mortgage, that was second in priority only to the original 1989 commercial note and mortgage.[3]

Pinewood Care defaulted on both notes in 1997, leading to a forbearance agreement that Pinewood Care ultimately breached. The note-holder thereafter commenced a foreclosure action in 1998 and obtained a judgment of foreclosure and sale in 1999. Pinewood Care filed bankruptcy and thereby stayed the foreclosure sale. This first bankruptcy was resolved in 2001, and that resolution included the following:

1. Pinewood Care sold part of the mortgaged property (Tract A) free and clear of the liens, and paid the sales proceeds to the note-holder.

2. Pinewood Care retained the remaining property (Tract B), subject to the commercial mortgages and judgment, with the amount due under the 1989 commercial note being reduced by the amount of the sales proceeds.

Tract B is the property at issue here. In 2002, the note-holder transferred its interest in the judgment and commercial mortgages to Royals.[4]

In 2004, Pinewood Care transferred its interest in Tract B to Appellant Kelly and his wife Mozelle Kelly, the president of Pinewood Care. Mrs. Kelly died, and her interest in Tract B was inherited by her daughter, Appellant Simpson, in 2007.[5]

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[2] Merits Order at 2-3, ¶¶ 11-14.
[3] *Id.* at 3-4, ¶¶ 15-16.
[4] *Id.* at 4-5, ¶¶ 17-25.
[5] *Id.* at 6, ¶¶ 26-27.

In 2009, Debtors defaulted and Royals commenced foreclosure. Appellant Kelly filed bankruptcy, thereby staying the foreclosure. The resolution of this foreclosure action and second bankruptcy included the following:

1. Debtors and Royals agreed that the total debt owed under the commercial notes and mortgages was $400,000.00.

2. Royals agreed that if Debtors made total payments of $125,000.00 plus interest in strict compliance with the terms of the agreement, then the total debt would be satisfied. But, if the Debtors defaulted on this agreement, the total debt would become due and owing, and Royals would have the right to foreclose its liens and mortgage on Tract B.

Debtors defaulted on the agreement in 2011 and 2012, and Royals commenced the instant foreclosure action in 2012.[6]

The trial court entered its decree and judgment of foreclosure and sale in January 2015. The trial court entered a separate order denying Debtor's post-trial motion for "foreclosure intervention" under the 2011 Administrative Order. The trial court denied the motion upon the following grounds:

1. Any right to "foreclosure intervention" was dependent upon the loan being subject to the HMP.

2. Here, the loan was not guaranteed by Fannie Mae or Freddie Mac, and Royals had not agreed to participate in the HMP.

3. The 2011 Administrative Order applied only if the loan was subject to the requirements of the HMP program, and the loan at issue here was not subject to those requirements for the foregoing reasons.

4. Therefore, the 2011 Order did not apply to Royals and, in any event, Royals satisfied the requirements of that Order.

[6] *Id.* at 7-9, ¶¶ 32-56.

(Order Denying Motion to Stay Foreclosure Action). Debtors' appeal presents only two arguments: (1) the 2011 Administrative Order created a new state law right to "foreclosure intervention"; and (2) Royals failed to afford them this new state law right.[7]

Debtors appealed in February 2015 and thereafter moved before the trial court in April 2015 to stay the foreclosure sale. (Notice of Appeal; Motion to Stay Foreclosure Sale). The only bond or undertaking offered by the Debtors was their "affidavits of undertaking," wherein they personally promised to pay all amounts due if their appeal was unsuccessful. (Affs. att'd to Motion to Stay). The trial court denied this motion. (Order Denying Motion to Stay Sale). Debtors did not seek an order of supersedeas or stay from this Court. Debtors do not appeal the denial of their motion to stay the sale, thereby making it the law of this case. *Transportation Ins. Co. v. South Carolina Second Injury Fund*, 699 S.E.2d 687, 691-692 (S.C. 2010).

The foreclosure sale was scheduled for May 4, 2015, but Appellant Simpson filed a Chapter 13 Bankruptcy Petition on May 1, 2015, thereby staying the foreclosure sale. The Trustee ultimately abandoned any interest in the subject property in this third bankruptcy, and the foreclosure sale was scheduled for December 7, 2015. Before that sale could be held, Appellant Kelly filed a Chapter 13 Bankruptcy Petition on December 2, 2015. This fourth bankruptcy was ultimately dismissed in June 2016, and the foreclosure sale was held on August 1, 2016. The successful bidder was Leonard Taylor, the husband of Appellant Simpson's sister and Appellant Kelly's daughter.

[7] See "Statement of Issues on Appeal" at Init. App. Br. 1, and "Argument" at Init. App. Br. 10-18.

ARGUMENT

It is the undisputed law of this case that Debtors do not qualify for the federal right to "foreclosure intervention." Debtors nevertheless assert a right to "foreclosure intervention" under the 2011 Administrative Order. Since it is undisputed that Debtors had no federal right to foreclosure intervention, Debtors necessarily (albeit somewhat silently) contend that the 2011 Order created a new state law right to foreclosure intervention. Debtors' interpretation of the 2011 Order fails as a matter of law, because the Chief Justice does not have the power or subject matter jurisdiction to create a state law right in an administrative order, and the Chief Justice did not do so in the 2011 Order.

I. Debtors' interpretation of the 2011 Order must be rejected because the Chief Justice of the South Carolina Supreme Court, acting as the administrative head of the South Carolina judicial system, does not have the power or subject matter jurisdiction to create a new state law right in an administrative order.

The South Carolina Constitution makes the Chief Justice the "*administrative* head of the unified judicial system." S.C. Const. art. V, § 4 (emphasis added).[8] The power and authority of the Chief Justice to administer the judicial system is defined by S.C. Code Ann. § 14-1-90 (Rev. 2017), which provides in full as follows:

[8] Article V, § 4 provides in full (emphasis added):

> The Chief Justice of the Supreme Court shall be the *administrative head of the unified judicial system*. He shall appoint an administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the State. The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. Provided, each county shall be entitled to four weeks of court each year and such terms therefor shall be provided for by the General Assembly. Provided, further, that the Chief Justice shall set a term of at least one week in any court of original jurisdiction in any county within sixty days after receipt by him of a resolution of the county bar requesting it. The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

> The Chief Justice of the Supreme Court shall be the *administrative* head of all courts in this State. He shall examine the *administrative* methods, systems and activities of the courts and their employees, examine the dockets of the several courts and require the courts and their employees to furnish to him such information as may be appropriate to assist in the *administration* of the courts. Within the framework of the requirements of Section 14-3-390, he shall make all assignments of duties for the circuit judges and may, from time to time, transfer a circuit judge from one assignment to another, as such judge's regularly assigned duties will permit and as the need appears. He shall have the right to call additional terms of court, to assign more than one judge to a circuit, if such additional judge's regularly assigned duties will permit and if need appears, and *generally to supervise* the calendars of trial courts in the *interest of the better administration* of justice. In the event that there is a vacancy in the position of Chief Justice or for any reason the Chief Justice is unable to act, the powers and functions provided in this section shall be exercised by the senior associate justice.

(Emphasis added). The Chief Justice's power is wholly administrative and is limited to the "better *administration* of justice," *i.e.*, the administration of existing rights. The Chief Justice does not have the power or subject matter jurisdiction to issue an *administrative* order that *creates* rights. Therefore, the 2011 Administrative Order could not (and did not) create any state law right to foreclosure intervention.[9]

The absence of power to create a state law right in an administrative order cannot be cured by treating the 2011 Order as promulgating or amending a rule of practice and procedure. That power resides with the Supreme Court, and no rule or amendment is effective without the approval of the General Assembly as provided by the South Carolina Constitution and statutory law. The Constitution provides in relevant part as follows:

> *All rules and amendments* to rules governing practice and procedure in all courts of this State promulgated *by the Supreme Court* must be *submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly* during a regular session, but not later than the first

[9] Similarly, no state can expand or otherwise alter a federal right by any action, be it judicial, executive, or legislative. Any such action would violate the Supremacy Clause of the Constitution of the United States. Thus, Debtors' arguments necessarily rely on an interpretation of the 2011 Order as creating a new state law right to foreclosure intervention.

> day of February during each session. Such rules or amendments shall *become effective ninety calendar days after submission unless disapproved* by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

S.C. Const. art. V, § 4(A) (emphasis added).[10] It is thus clear that the 2011 Administrative Order is not and cannot be a rule or amendment "governing practice and procedure."

The "hook" for the federal power to create a right to foreclosure intervention is one of contract. Lenders participate in the Fannie Mae or Freddie Mac loan programs by contracting to do so, thereby voluntarily submitting themselves to the power of the federal government to regulate them with respect to those loans. Alternatively, lenders not subject to such regulations can submit themselves to the federal right by voluntarily agreeing to participate in the HMP by written agreement, *i.e.*, by contract.

Here, Debtors have no contractual right to foreclosure intervention, because the parties' contracts do not grant any such right. Imposing any such right by administrative order would be a retroactive impairment of Royals' contractual right to foreclose the mortgage, which would violate the Contracts Clause of the State and Federal Constitutions. See, *e.g.*, S.C. Const. art. I, § 4 (prohibiting any "law impairing the obligation of contracts").[11] It would also be a violation of the Due Process Clause of the State and

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[10] South Carolina Code § 14-3-950 (Rev. 2017) (emphasis added) similarly provides in full as follows:

> *All rules and amendments* to rules governing practice and procedure in all courts of this State *promulgated by the Supreme Court* shall be *submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly* during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become *effective ninety calendar days after submission unless disapproved* by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

[11] The implied covenant of good faith and fair dealing, which exists in every contract in South Carolina, is not and cannot be a basis for imposing any state right to foreclosure intervention. The implied covenant is not and cannot be breached by a party that exercises a right granted by the contract. *Adams v. G.J. Creel & Sons*, 465 S.E.2d 84, 85 (S.C. 1995). Here, Royals foreclosed the mortgage based on an express contractual right to do so that arose when Debtors defaulted on the terms of the commercial note and mortgage.

Federal Constitutions, because the right would have been created judicially without notice to anyone and without an opportunity to be heard being given to anyone. See, *e.g.*, S.C. Const. art. I, § 3 (no person shall be deprived of property "without due process of law"); *South Carolina Ambulatory Surgery Ctr. Ass'n v. South Carolina Worker's Comp. Comm'n*, 699 S.E.2d 146, 152-153 (S.C. 2010) (the fundamental requirements of due process under the state and federal constitutions include notice and a meaningful opportunity to be heard); see also S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . .").

Finally, it is axiomatic that a condition precedent to a judicial ruling is the existence of a "case or controversy" presented by parties that are before the court and over which the court has jurisdiction. See *People's Fed. S&L Ass'n v. Resources Planning Corp.*, 596 S.E.2d 51, 60 (S.C. 2004). The "controversy" requirement is essential to the judicial process, because it provides a crucible of opposing views. Here, no one asked the Supreme Court or the Chief Justice to create a state law right to foreclosure intervention, and nothing in the 2011 Administrative Order creates any such right.

In summary, it is the undisputed law of this case that Debtors have no federal right to foreclosure intervention. The 2011 Order could not create a state law right to foreclosure intervention. This moots all other issues on appeal, because it matters not why Royals denied a nonexistent right, which Royals granted in any event. Thus, the trial court did not err in denying Debtor's motion to stay the foreclosure action for the purpose of affording them any right to foreclosure intervention.

II. The Chief Justice of the South Carolina Supreme Court did not intend to create and did not create a new state law right to foreclosure intervention in Administrative Order 2011-05-02-01.

Debtors interpret the 2011 Administrative Order as creating a state law right to foreclosure intervention. A plain reading of the Order as a whole demonstrates that their interpretation is incorrect and that the Order only imposed new procedures for handling the federal right to foreclosure intervention.

The rules for interpreting a court order are the same rules for interpreting a contract or statute. See *Petition of White*, 385 S.E.2d 211, 215 (S.C. App. 1989) (trial court's order construed like any other written instrument); *Weil v. Weil*, 382 S.E.2d 471, 474 (S.C. App. 1989). The controlling inquiry is the intent of the authoring judge. *O'Banner v. Westinghouse Elec. Corp.*, 459 S.E.2d 324, 327 (S.C. App. 1995). That intent must first be gleaned from the order itself, read as a whole and giving effect to every word in the order, not just isolated parts. *Eddins v. Eddins*, 403 S.E.2d 164, 166 (S.C. App. 1991); *Management Recruiters, Inc. v. R.J.R. Mechanical, Inc.*, 404 S.E.2d 908, 909 (S.C. App. 1991). The 2011 Administrative Order was not written in a vacuum – it is the third of three orders on the same subject and, therefore, the controlling inquiry of intent must be resolved by reviewing all three orders. See *Klutts v. Resort Realty, Inc. v. Down'Round Dev.*, 232 S.E.2d 20, 24 (S.C. 1977) (intent of contracting parties to be determined by reviewing all contracts between the same parties regarding the same subject matter).

On May 4, 2009, Fannie Mae sought an emergency TRO from the South Carolina Supreme Court in its Original Jurisdiction that enjoined all foreclosure sales involving loans guaranteed by Fannie Mae. The grounds for the motion were as follows:

1. On February 18, 2009, the President of the United States announced a federal program to alleviate the home mortgage foreclosure crisis for certain loans.

2. On April 6, 2009, the United States Treasury Department issued guidelines implementing the federal program known as the Home Affordable Modification Program (HMP).

3. HMP applied in one of three situations: (a) a loan guaranteed by Fannie Mae; (b) a loan guaranteed by Freddie Mac; or (c) loans serviced by lenders that had signed an agreement to participate in HMP.

(Fannie Mae Motion, *passim*). On May 4, 2009, then Chief Justice Toal issued the TRO and enjoined foreclosure sales for "any property arising out of a loan owned or guaranteed by [Fannie Mae] or [Freddie Mac] or held by a servicer who has signed an agreement to participate in the HMP." (TRO at 1). The TRO was to be lifted upon a showing that the loan was "not subject to modification under HMP," *i.e.,* a loan that was not a Frannie Mae or Freddie Mac loan, and the lender had not signed an agreement to participate in the HMP. (TRO at 2).

On May 22, 2009, the Chief Justice rescinded the TRO and replaced it with the 2009 Administrative Order. (2009 Admn. Order at 3). The purpose of this Order was to "insure that *eligible* homeowners have been afforded the benefits *available under the HMP*" and to make uniform the procedures for handling HMP issues. (*Id.* at 1)(emphasis added). To that end, the 2009 Order set forth procedures for handling the federal right to foreclosure intervention within the framework of state foreclosure actions. (*Id.* at 2-3, ¶¶ (1)-(2)). The Chief Justice specifically noted that eligibility for HMP benefits were limited to homeowners with mortgages guaranteed by Fannie Mae or Freddie Mac, or mortgages held by servicers who had agreed to participate in the HMP. (*Id.*). As to this issue of eligibility, the 2009 Order directed the trial courts to determine any issue "regarding the

eligibility of the loan for modification *under the HMP* or satisfaction of the requirements of the HMP *if it applies*." (*Id.* at 2)(emphasis added). If the trial court determined "that the HMP is either inapplicable to the mortgage loan or that the HMP requirements have been satisfied," then the foreclosure action or foreclosure sale could proceed. (*Id.* at 3, ¶ 4).

On May 2, 2011, the Chief Justice issued the 2011 Administrative Order. The express purpose of this Order was to address difficulties that had arisen in the administration of the federal right to foreclosure intervention under the 2009 Order.

The 2011 Order has two parts. The first part summarizes the 2009 Administrative Order and the federal right to foreclosure intervention that was the impetus to the 2009 Order, including the fact that the right to foreclosure intervention was limited to Fannie Mae loans, Freddie Mac loans, and lenders who had agreed to participate in the HMP. (2011 Admn. Order at 1). The first part of the 2011 Order next notes that difficulties had arisen in the implementation of the 2009 Order, which were "largely the result of difficulty in communications between lender-servicers and debtors, and the fact that foreclosure actions are proceeding to conclusion without regard to *ongoing loss mitigation efforts* by the parties." (*Id.* at 1) (emphasis added).

The "ongoing loss mitigation efforts by the parties" were the result of the federal right created by the HMP and administered by the 2009 Administrative Order. The 2011 Order continued:

> Therefore, *based on the* foregoing, and in order to insure that *eligible* homeowners and lender-services have been afforded the *benefits* of *loan modification or other loss mitigation where possible*, and to insure that the procedures for handling issues relating to such efforts are handled uniformly throughout the State, so that mortgage foreclosure actions are not unnecessarily dismissed, delayed or inappropriately concluded while *loan modification or other loss mitigation efforts are being pursued*, it is ordered as follows:

(*Id.* at 2) (all emphasis added). The "foregoing" were the difficulties experienced in implementing the 2009 Order, and what "follow[ed]" was a new set of procedures expressly designed to address those difficulties. (*Id.* at 2-5).

The 2011 Order did not rescind the 2009 Order, and nothing in the 2011 Order states any intent to create a new state law right to foreclosure intervention. If the Chief Justice had intended to change state law and create a new state law right, the 2011 Order would have done so specifically and expressly. *Swenter v. Swenter*, 520 S.E.2d 330, 337 (S.C. App. 1999) (if legislature intended to change the law, would have done so expressly). Moreover, to the extent any language in the 2011 Order supports Debtors' interpretation of the 2011 Order, that interpretation must be avoided if possible because, as shown in Argument I, *supra*, acceptance of their interpretation would render the 2011 Order unconstitutional and void for lack of subject matter jurisdiction. See, *e.g., Gilstrap v. South Carolina Budget & Control Bd.*, 423 S.E.2d 101, 105 (S.C. 1992) (whenever possible, courts must avoid interpretation of a statute that would render it unconstitutional); *Hampton v. Haley*, 743 S.E.2d 258, 265 (S.C. App. 2013) (same). As shown above, Debtors' interpretation of the 2011 Order not only can be, but must be, avoided under the express terms of the 2011 Order.

In summary, the express purpose of the 2011 Order was to address the difficulties experienced by trial courts in implementing the federal right to foreclosure intervention as granted by the HMP and administered by the 2009 Order. Nothing in the 2011 Order created a new state law right to foreclosure intervention, and it is the undisputed law of this case that the federal right to foreclosure intervention does not apply here. This moots all other issues on appeal, because it matters not why Royals denied a nonexistent right. Thus,

the trial court did not err in denying Debtor's motion to stay the foreclosure action for the purpose of affording them any right to foreclosure intervention.

III. The trial court correctly found that the 2011 Administrative Order did not grant any "foreclosure intervention" rights to Debtors, and Debtors' contrary arguments are not properly before this Court for appellate review.

The trial court held that the 2011 Administrative Order did not apply to Royals, because it was limited to HMP loans, *i.e.*, Fannie Mae loans, Freddie Mac loans, or loans by lenders that had agreed to participate in the HMP. (Stay Order at 2). This ruling was manifestly correct as demonstrated in Arguments I and II, *supra* – the 2011 Order could not and did not create any state law right to foreclosure intervention.

On appeal, Debtors argue that all provisions of the 2011 Order apply to Royals. (Init. App. Br. 11-15). They analyze the 2011 Order by dividing it into four parts, focusing on some provisions in some of those parts, and attaching great significance to the meaning of some words used in some of those provisions. (*Id.* at 12-15). It is axiomatic, however, that intent must be determined by reading the order in its entirety rather than isolated parts. *Doe v. Bishop of Charleston*, 754 S.E.2d 494, 498 (S.C. 2014). Additionally, intent must be determined by reading the 2011 Order in conjunction with the prior orders on the same subject, as well as the expressly stated purpose of the 2011 Order. As shown in Argument II, *supra*, the express purpose of the 2011 Order was to improve the administration of the federal right to HMP, and it did not create a state law right to foreclosure intervention.[12]

The cornerstone of Debtors' argument is their conclusion that the Chief Justice intended to create a new state law right to "foreclosure intervention":

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[12] At times, Debtors support their argument by citation to THE WASHINGTON POST. (Init. App. Br. at 12-13, nn. 5-6). The opinions or "facts" reported in THE WASHINGTON POST are irrelevant to the issues before this Court, and any "facts" would be manifest hearsay to which Royals objects.

> Given that the 2009 Order did not reduce the number of foreclosure filings, it is *logical* that the 2011 Order *expanded its reach to all* mortgagees seeking foreclosure of residential property *rather than only those subject to the HMP*.

(Init. App. Br. at 14) (all emphasis added). Debtors never made this cornerstone argument to the trial court specifically (Tr. 151-152) and, therefore, it is not preserved for appeal. *Bean v. South Carolina Cent. R.R. Co.*, 709 S.E.2d 99, 111 (S.C. App. 2011) (argument not preserved if appellant did not make the "specific" argument to the trial court). Assuming Debtors made any such argument, it nevertheless remains unpreserved for appeal, because the trial court did not rule on it explicitly, and Debtors did not seek a ruling by motion for reconsideration. *Noisette v. Ismail*, 403 S.E.2d 122, 124 (S.C. 1991) (when trial court does "not explicitly rule" on an argument, it is not preserved for appeal if appellant does not seek a ruling by motion to reconsider); *Floyd v. Floyd*, 615 S.E.2d 465, 474 (S.C. App. 2005) (when trial court's general ruling "does not address the specific argument raised by the appellant," it is not preserved if appellant does not seek a ruling by 59(e) motion). In any event, Debtors' argument has no merit.

Debtors' cornerstone argument is based on the false premise that the purpose of the 2009 was to "reduce the number of foreclosure filings." Nothing in the 2009 Order supports this premise – nothing in the 2009 Order cites "reduc[ing] filings" as a basis for the Order. Rather, the expressly stated purpose of the 2009 Order was to administer the federal right to foreclosure intervention under the HMP.[13] Relying on this false premise,

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[13] The 2009 Order expressly stated its purpose as follows:

> To ensure that eligible homeowners have been afforded the benefits available under the HMP, the procedures for handling issues relating to the HMP are handled uniformly throughout the State, and mortgage foreclosure actions are not unnecessarily dismissed or delayed while HMP issues are resolved, I direct the following:

Debtors "logically" conclude that the purpose of the 2011 Order was to expand the federal right to foreclosure intervention beyond the HMP to all mortgagees (lenders) in South Carolina and create a new state law right to foreclosure intervention. Whenever logic is applied to a false premise, it inexorably leads to the wrong conclusion. Moreover, as demonstrated in Argument II, *supra*, the express purpose of the 2011 Order was to address the administrative difficulties that had arisen under the 2009 Order's administration of the federal right to foreclosure intervention.

As noted earlier, Debtors support their erroneous and falsely-premised conclusion by parsing out certain procedural provisions and attaching great significance to them. They have missed the controlling provision – the 2011 Order imposed those procedures "based on the foregoing," and that "foregoing" was the difficulty experienced in administering the federal right to foreclosure intervention under the 2009 Order. (2011 Admn. Order at 2; *id.* at 1-2) If the Chief Justice intended to create a new state law right to foreclosure intervention, one would not have to sift through various procedural provisions to divine that intent by logic. The Chief Justice would have done so expressly and specifically. Nothing in the 2011 Order does so, and the express language regarding the purpose of the 2011 Order disproves any such intent.

IV. The trial court correctly found that Royals had complied with the applicable requirements of the 2011 Administrative Order, and Debtors' contrary arguments are not properly before this Court for appellate review.

The trial court found that Royals had discharged any responsibilities under the 2011 Order based on two different and independent grounds. First, the trial court held that the

(2009 Admn. Order at 1) (emphasis added). What followed were procedures designed to administer the federal right to foreclosure intervention under the HMP.

"Counsel's Certification Regarding Compliance with [the 2011 Order]" demonstrated that Royals had discharged any applicable duties imposed by the 2011 Order. (Stay Order at 2-3). Second, the trial court noted that Debtors relied "exclusively" on the trial testimony of William Buland that foreclosure intervention was denied because this was a commercial loan. The trial court ruled, however, that this testimony did not overcome the showing of compliance made in "Counsel's Certification." (Stay Order at 3). As shown below, this Court should affirm for three separate reasons:

A. The trial court's rulings that the "Counsel's Certification" established compliance with the 2011 Order are the law of this case and require affirmance.

B. The trial court correctly ruled that the "Counsel's Certification" demonstrated compliance with any applicable requirements of the 2011 Order, and Debtors have failed to show otherwise.

C. As an additional sustaining ground, the trial court erred in excluding the affidavit of Robert Eisman (with exhibits), and this evidence further demonstrates that Royals complied with the applicable requirements of the 2011 Order.

Affirmance on any one of these independent grounds moots all other issues in this case, including the issues of whether an administrative order can create new state law rights.

A. The trial court's rulings that the Counsel's Certification established compliance with the 2011 Order are the law of this case.

An unappealed ruling by the trial court, whether "right or wrong, is the law of the case and requires affirmance." *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970); *Hotel & Motel Holdings, LLC v. BJC Enters.*, 780 S.E.2d 263, 276 (S.C. App. 2015) (same). When a trial court's decision is based on more than one ground, as it is here, the appellate court must affirm unless the appellant appeals all grounds, because the unappealed ground becomes the law of the case. *Anderson v. Short*, 476 S.E.2d 475, 476

(S.C. 1996). Assuming Debtors have appealed both of these grounds (and they have not), the trial court must be affirmed if either ground is correct (and both are correct). *Anderson v. South Carolina Dep't of Hwys. & Pub. Transp.*, 472 S.E.2d 253, 254-255 & n.1 (S.C. 1996) (appellate court must affirm if any of trial court's multiple grounds for its ruling are correct); *Wofford v. City of Spartanburg*, 781 S.E.2d 146, 149 (S.C. App. 2015) (same).

On appeal, Debtors do not challenge the trial court's rulings that the Counsel's Certification demonstrated compliance with the 2011 Order, or that Buland's "commercial loan" testimony did not overcome this demonstration. (See Init. App. Br., Arg. II at 15-18, *passim*). Debtors make passing references to the certification requirement and the filing of the Counsel's Certification, but they never argue specifically that the trial court erred in its rulings in reliance on the Counsel's Certification. (*Id.* at 15-16, 16-17). Indeed, they never address the contents of the Certification, and never analyze or argue against the contents of the Certification. (*Id.* at 15-18, *passim*). Manifestly, one cannot argue against a ruling based on the Certification without addressing the contents of that Certification. Thus, each of the trial court's rulings is the law of this case and requires affirmance, thereby mooting all other issues in this case.

The only semblance of an argument is the following conclusory statement made in Debtors' Brief of Appellant:

> On January 10, 2014, over a year after [Royals] filed the foreclosure Complaint, [Royals] filed a certificate of compliance with the 2011 Order. (Certificate). [Debtors] maintained throughout the trial that [Royals] failed to comply with the 2011 Order's requirements and failed to engage in foreclosure intervention efforts in good faith.

(Init. App. Br. at 16-17). It is axiomatic, however, that a "short conclusory statement" is insufficient to present an issue for appellate review. *Ellie, Inc. v. Miccihi*, 594 S.E.2d 485,

496 (S.C. App. 2004); *accord Brouwer v. Sisters of Charity Providence Hosps.*, 763 S.E.2d 200, 203 n.4 (S.C. 2014). Indeed, Debtors never even acknowledge the existence of the trial court's rulings on the Counsel's Certification. (See Init. App. Br. at 15-18, *passim*).

Debtors never attempt to demonstrate that the Certification was insufficient to show compliance with the 2011 Order and, they never challenge the trial court's ruling that Buland's "commercial loan" testimony was insufficient to overcome the showing made in the Certification. (Init. App. Br. at 15-18, *passim*). Thus, the trial court's rulings are the law of this case and, right or wrong, require affirmance, which moots all other issues on appeal. Any attempt by Debtors to make arguments against the trial court's "Counsel's Certification" rulings in their Reply Brief would be a futile act. It is axiomatic that a trial court's rulings cannot be challenged for the first time in a reply brief. *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011).

B. The trial court correctly ruled that the "Counsel's Certification" demonstrated compliance with any applicable requirements of the 2011 Order, and Debtors have failed to show otherwise.

The "Counsel's Certification" demonstrated the following regarding Royal's compliance with the 2011 Order:

1. Royals was not subject to the terms of the 2011 Order but had nevertheless complied with it.

2. Royals had served Debtors with a notice of their right to foreclosure intervention, if any, for the purpose of resolving the foreclosure action.

3. Royals had afforded Debtors the opportunity to submit any information that they wanted Royals to consider, and Royals had considered all information submitted by Debtors.

4. After reviewing the information submitted by Debtors, the parties had been unable to resolve the foreclosure action.

5. Royals notified Debtors that foreclosure intervention had been denied.

(Counsel's Cert. at 1-2). Notably, Debtors never challenged the accuracy of the Certification after it was filed and served, and they never sought to stay the foreclosure action for any further efforts at foreclosure intervention.

On appeal, Debtors make two arguments without ever addressing the trial court's rulings based on the "Counsel's Certification":

1. Royals did not believe the 2011 Order applied, because the loan was a "commercial loan" and, therefore, Royals "merely walked through the steps of foreclosure intervention without actually engaging in the process."

2. Royals failed to act in good faith, because it required Debtors to "waive all defenses and the right to a jury trial before it considered modification or loss mitigation efforts."

(Init. App. Br. at 15). As shown in Argument IV(A), *supra*, Debtors' appellate arguments cannot show any basis for reversal, because it is the law of this case that the Counsel's Certification demonstrated compliance with the 2011 Order. As shown below, Debtors' arguments are not properly before this Court for appellate review for other reasons and, in any event, their arguments have no merit.

1. Debtors' argument on waiver of defenses and jury trial is not preserved for appeal and has no merit.

Debtors never made their "waiver" argument in support of their motion to stay the foreclosure proceedings for further foreclosure intervention efforts. (Tr. 151-152). Debtors presented testimony on this matter during the trial (Tr. 36), but they never relied on it to make their motion and never made this "specific" argument to the trial court. (Tr. 151-152). Thus, their argument is not preserved for appeal. *Bean,* 709 S.E.2d at 111 (argument not preserved if appellant did not make the "specific" argument to the trial court). Moreover, assuming the presentation of testimony was sufficient to raise the issue, the trial

court did not rule on it explicitly, and Debtors did not make a 59(e) motion to obtain a specific ruling. Thus, the issue remains unpreserved for appeal. *Noisette*, 403 S.E.2d at 124 (when trial court does "not explicitly rule" on an argument, it is not preserved for appeal if appellant does not seek a ruling by motion to reconsider); *Floyd*, 615 S.E.2d at 474 (when trial court's general ruling "does not address the specific argument raised by the appellant," it is not preserved if appellant does not seek a ruling by 59(e) motion).

It is true that Royals would not consider foreclosure intervention unless Debtors agreed to waive the right to a jury trial in any agreement to resolve the foreclosure action. It is equally clear, however, that Debtors were unwilling to consider any agreement that included a waiver of the right to a jury trial. (Tr. 44). Moreover, Debtors insisted on settling by way of a pay-off of the unpaid balance of the $125,000.00, rather than the full debt of $400,000.00, *i.e.*, Debtors refused to discuss settlement based on the entire debt that had been accelerated due their defaults. (Simpson Depo. at 28-29). Given this impasse, any further efforts at resolving the foreclosure action would have been a futile act and, therefore, Royals was free to pursue foreclosure without any further efforts at resolving the foreclosure action or otherwise complying with the 2011 Order, even if it is assumed that the 2011 Order applied here (and it does not). *Storm M. H. v. Charleston County Bd. of Trustees*, 735 S.E.2d 492, 497 (S.C. 2012) (party may continue pursuit of judicial action despite not exhausting administrative remedies when doing so would have been futile); *Shupe v. Settle*, 445 S.E.2d 651, 654-655 (S.C. App. 1994) (compliance with procedures for gaining access to records not required when further efforts would have been futile).

Moreover, requiring a waiver of the right to a jury trial as a condition for resolving the foreclosure action was not and could not be a lack of good faith under the circumstances

of this case. In 2009, when Debtors defaulted on the loan and Appellant Kelly filed his first bankruptcy, the parties resolved the issues between them with an agreement that included a waiver of the right to a jury trial. (Cmplnt. Exh. K at 7-8, ¶ 14). Debtors thereafter defaulted on this agreement, giving rise to the current foreclosure action. Manifestly, it is not and cannot be a lack of good faith for Royals to require a continuation of the existing jury trial waiver as a condition to resolving the Debtors' second default on the loan. To the contrary, Debtors' insistence on removing the existing waiver demonstrates a lack of good faith on their part in attempting to resolve the foreclosure action. Thus, Debtors' appellate argument has no merit.

As to the waiver of defenses, this is a standard requirement for resolving foreclosure actions, particularly when it is the second action caused by a debtor's default on the agreement resolving the first action only 16 months after entering that agreement, and it is therefore not a lack of good faith. Moreover, any issue over the waiver of defenses became moot upon the impasse over the waiver of the right to a jury trial. Royals had the absolute right to require a continuation of the existing jury trial waiver as a condition to resolving the current foreclosure action. Debtors refused any agreement that included the jury trial waiver and, therefore, it matters not that Royals also required a waiver of defenses.

2. Debtors' "commercial loan" argument has no merit and is moot.

Debtors' argument is based on the false premise that Royals has denied foreclosure intervention and the applicability of the 2011 Administrative Order based solely on the undisputed fact that the loan was a commercial loan. Royals, however, has always asserted the independent ground that it was not subject to the 2011 Order, because it was not subject to federal right of foreclosure intervention imposed by the HMP, and the 2011 Order was

limited to loans subject to the federal right to foreclosure intervention. (See, *e.g.*, Notice of Mortgagor's Right to Foreclosure Intervention at p. 1; "Counsel's Certification" at p. 1; Tr. 152; Merits Order at 2, ¶ 6). It is the undisputed law of this case that the federal right to foreclosure intervention does not apply here and, as demonstrated in Arguments I-II, *supra*, the 2011 Order did not and could not create any state law rights to foreclosure intervention. Thus, assuming Debtors' "commercial loan" argument has any merit (and it does not), it is moot. Debtors had no state or federal law right to foreclosure intervention and, therefore, it matters not why Royals refused to grant a nonexistent right to foreclosure intervention. Like every party to every contract in South Carolina, Royals was entitled to enforce its contractual remedies for Debtors' failure to perform their contractual duties.

In like manner, Debtors' "commercial loan" argument is also mooted by the impasse over the waiver of the right to a jury trial. Royals had the absolute right to insist on a continuation of the existing waiver as a condition to any resolution of the current foreclosure action, and Debtors refused any agreement that included a waiver. Thus, it matters not whether Royals denied a nonexistent right to foreclosure intervention for other reasons, which Royals did not deny in any event.

As to the merits of Debtors' "commercial loan" argument, they rely solely on the testimony of William Buland. They argue that Royals did not comply with the 2011 Administrative Order, because it denied Debtors' "loan modification application" based solely on Royals' conclusion that: (1) this was a "commercial loan"; and (2) and the 2011 Order did not apply to a "commercial loan." (Init. App. Br. 17). Buland, however, testified differently than argued by Debtors:

1. Royals considered the debt at issue here to be a "commercial debt" created under a "commercial loan." (Tr. 41).[14]

2. He did not review the documents that Debtors' submitted as a loan modification application – that was done by Robert Eisman. (Tr. 45).

3. He "guess[ed]" that the commercial nature of the loan was "probably . . . the main criteria" for denying Debtors' "loan modification proposal." (Tr. 41).

This testimony fully supports the trial court's ruling that Buland's testimony did not overcome the showing of compliance with the 2011 Order made in the Counsel's Certification. (Stay Order at 3). And, as noted earlier, Debtors have not challenged this ruling on appeal, thereby making it the law of the case that is binding on appeal and, right or wrong, requires affirmance of the appealed order. *Buckner*, 177 S.E.2d at 544.[15]

C. As an additional sustaining ground, the trial court erred in excluding the affidavit of Robert Eisman, and this evidence demonstrates that Royals complied with the requirements of the 2011 Order.

[14] It is undisputed that the debt at issue here is the remainder of a commercial debt that arose from a commercial loan to a commercial business entity (Pinewood Care) that secured the commercial loan by a granting a commercial mortgage on its commercial property, including the property at issue here. Appellant Simpson admitted all of this. (Tr. 121). It is undisputed that all of this remained true when Royals acquired the prior note-holders' interest in this commercial transaction, at a time when Pinewood Care remained the owner of the property at issue here. (See generally, Merits Order at 4-5, ¶¶ 17-25). Debtors did not obtain their interest in the property until later, when Pinewood Care conveyed its interest in the property to Appellant Kelly and his wife, who later died and left her interest in the property to her daughter, Appellant Simpson. (*Id.* at 6, ¶¶ 26-27). Based on this transfer, Debtors argue the property became an "owner occupied dwelling," because they lived there. In reality, it became an "owner occupied business," because it is undisputed that Appellant Simpson thereafter continued the existing commercial use of the property in her business of providing assisted care to two elderly persons who lived at the property with Debtors. (Tr. 56-57). Nothing in the 2011 Administrative Order indicates an intent that it apply to this scenario, to-wit: a purely commercial debt that was secured by a commercial property that Debtors thereafter transmuted into, at most, a hybrid of dwelling and commercial uses.

[15] Debtors rely on different testimony from Buland, that arguably supports their argument more strongly. (Init. App. Br. at 17, citing Tr. 40, ll. 20-24; 41, ll. 5-8; and 46, ll. 8-12). At most, this testimony conflicts with the above-summarized testimony. See also Arg. IV(C), *infra*. It is axiomatic, however, that conflicting testimony from the same witness simply creates factual and credibility issues for the fact-finder in the trial (the master here). *E.g.*, *Colona v. Marlboro Park Hosp.*, 745 S.E.2d 128, 134 (S.C. App. 2013). It is equally axiomatic that, although an appellate court may take its own view of the evidence in an equity appeal, the appellate court generally defers to the findings by the master, "who saw and heard the witnesses [and] was in a better position to evaluate their credibility." *E.g.*, *Snow v. Smith*, 784 S.E.2d 242, 249 (S.C. App. 2016).

The trial court excluded evidence submitted by Royals on the question of whether Royals had engaged in foreclosure intervention and settlement discussions with Debtors that satisfied the requirements of the 2011 Administrative Order. This was error.

1. The Evidence of Record and Unchallenged Trial Court Rulings

In 2009, Debtors defaulted on the debt owed to Royals, and Royals commenced a foreclosure action. Appellant Kelly filed bankruptcy, thereby staying the foreclosure action. In resolving the bankruptcy and foreclosure action, the parties entered a September 2009 agreement whereby Royals agreed to what can only be described as a "sweetheart" deal of foreclosure intervention and loss mitigation: (1) the debt owed was $400,000.00; but (2) this debt would be forgiven if Debtors paid a total principal of $125,000.00 in accordance with a payment schedule. (Merits Order at 7, ¶¶ 32-36). In other words, Royals agreed to a loss mitigation that allowed Debtors to pay 31.25 cents on the dollar.

Only 16 months later, Debtors again defaulted by failing to timely make the January 2011 payment. (Merits Order at 8, ¶ 44). Debtors defaulted again when they later failed to pay the 2011 property taxes as required by the agreement. (Merits Order at 9, ¶¶ 51-55). In January 2012, despite these defaults on the sweetheart deal, Royals offered Debtors the opportunity to get out of default and avoid foreclosure by curing the defaults. (Tr. 46-47, 53; Pl. Exh. 5). Debtors never responded to this offer. (Tr. 47, 53). They believed that they were not in default – a position that they lost at trial and have abandoned on appeal. Royals had no choice but to thereafter commence the present foreclosure action in November 2012.

In July 2013, Debtors moved to compel Royals to comply with the 2011 Administrative Order. (Merits Order at 2, ¶ 5; Motion to Compel). Royals responded that

it was not subject to the 2011 Order, because it was not subject to the federal right to foreclosure intervention under the HMP, but nevertheless served Debtors with a "Notice of Mortgagor's Right to Foreclosure Intervention." (Merits Order at 2, ¶ 6; Notice of Mortgagor's Right). Several months later, Royals filed a "Counsel's Certification of Compliance" that showed the following:

1. Royals was not subject to the terms of the 2011 Order but had nevertheless complied with it.

2. Royals had served Debtors with a notice of their right to foreclosure intervention, if any, for the purpose of resolving the foreclosure action.

3. Royals had afforded Debtors the opportunity to submit any information that they wanted Royals to consider, and Royals had considered all information submitted by Debtors.

4. After reviewing the information submitted by Debtors, the parties had been unable to resolve the foreclosure action.

5. Royals notified Debtors that foreclosure intervention had been denied.

(Merits Order at 2, ¶ 7; Counsel's Cert. at 1-2). The excluded evidence provided further proof that Royals had repeatedly attempted to resolve the foreclosure action.

2. The Excluded Evidence

Prior to filing the present foreclosure action, Royals negotiated with Debtors' then-counsel for several weeks to resolve Debtors' defaults, but the parties could not reach an agreement. (Eisman Aff. At 2, ¶ 6). After filing the foreclosure action in November 2012, Royals continued to negotiate with Debtors' new counsel (trial counsel here) from late 2012 until May 2013, offering a resolution that would have kept Debtors' monthly payments at the pre-default amount, but Debtors refused this offer. (Eisman Aff. At 2, ¶ 8).

After Debtors filed their motion to compel compliance with the 2011 Order and Royals responded with its October 2013 notice of foreclosure intervention rights (Merits

Order at 2, ¶¶ 5-6), Royals invited Debtors to submit any proposals and supporting information for resolving the foreclosure action. (Eisman Aff. at 3, ¶ 11 and Exh. A). On November 26, 2013, in support of what Debtors now refer to as their "loan modification application," Debtors' counsel sent an email with 48 pages of documents to be considered by Royals. (Eisman Aff. at 3, ¶ 12 and Exh. B). Although their "application" contained no proposal for resolving the foreclosure, Royals considered the submitted information and the possibility of making yet another proposal to Debtors. (Eisman Aff. at 3, ¶ 13).

Robert Eisman, the general partner of Royals' managing member, personally reviewed the information submitted by Debtors. (Eisman Aff. at pp. 1 and 4 at ¶¶ 1 and 16). Based on this review, and given that Debtors had earlier rejected the "same payments" offer for resolving the foreclosure, Royals was unwilling to make yet another proposal. (Eisman Aff. at 3, ¶ 13). Robert Eisman was solely responsible for reviewing the submitted information, and he alone decided that Royals would not make another proposal – William Buland was not involved in this decision. (Eisman Aff. at 4, ¶ 16).[16] Royals advised Debtors of this decision on January 3, 2014. (Eisman Aff. at 3, ¶ 14 and Exh. C).

The merits trial was scheduled for May 14, 2014. (Eisman Aff. at 4, ¶ 17). At Debtors' request, the trial was postponed for further negotiations. (*Id.*). William Buland immediately met with Debtors and their counsel for several hours that same day. (*Id.*). The parties did not reach an agreement, but left the discussions open. (*Id.*).

The parties continued to discuss a possible resolution and, on August 5, 2014, Royals requested updated financial information from Debtors to further consider a possible

[16] Debtors were aware of this undisputed fact prior to trial. William Buland had said this in his deposition, and Royals had made this clear in its answers to Debtors' interrogatories. (10/3/14 email from P. Harrill to trial court with answers to interrogatories; Answer to Interrogatories at 9, answering questions 18-19; see also *id.* at 5, 8-10, answering questions 7-8, 16-20).

settlement based on a property appraisal recently obtained by Debtors. (Eisman Aff. at 4-5, ¶18 and Exh. E). Debtors, however, did not respond to this request for updated settlement information. (Eisman Aff. at 4-5, ¶ 18).

3. The trial court erred in including the evidence.

At trial, Royals presented the testimony of William Buland to prove its foreclosure claim, *i.e.*, to prove that Debtors were in default, the amount of the debt, fees and costs, etc. (Tr. 10-31). On cross-examination, Debtors questioned Buland on Debtors' November 2013 "loan modification application" and Royals' refusal to propose yet another resolution. (Tr. 40-41). Buland did not know all of the reasons for refusing to do so – Robert Eisman had reviewed the application – but he "guess[ed]" that the "main criteria" was that the loan was a commercial debt. (Tr. 41, 45). Debtors did not move to stay the foreclosure action after Buland's "commercial debt" testimony. (Tr. 54).

After the close of the evidence, Debtors for the first time in the trial contended that, based solely on Buland's "commercial debt" testimony, they were entitled to a "review[] for mortgage intervention" under the 2011 Administrative Order. (Tr. 151-152). Royals responded *inter alia* that it was not subject to the 2011 Order, because it was not a participant in the HMP, and that it had nevertheless complied with the 2011 Order. (Tr. 152). Royals further noted, without objection or contradiction, that Debtors had withdrawn their pre-trial motion to stay the foreclosure for compliance with the 2011 Administrative Order. (Tr. 152). The trial court took the motion and the foreclosure under advisement, requesting proposed orders from both parties. (Tr. 153).

Royals submitted its proposed order denying Debtors' motion, together with the affidavit of Robert Eisman and supporting attachments. (10/1/14 email from P. Harrill to

trial court with proposed order and Eisman Affidavit). Debtors objected to the Eisman Affidavit as untimely, because it was submitted after the close of the evidence. (10/2/14 email and letter from P. Curiale to trial court). Royals responded that consideration of the affidavit and exhibits was proper for several reasons:

1. It was timely, because Debtors did not raise the issue and make their motion until after the close of the evidence.

2. Accepting the affidavit and exhibits after the close of the evidence in the merits trial was appropriate, because the issue raised by the motion was not relevant to the merits of the case.

3. The affidavit and exhibits were highly relevant to the issue raised in Debtors' post-evidence motion and essential to a proper understanding of the breadth and depth of Royals' attempts to resolve the foreclosure action, which had not been challenged by Debtors during the merits trial.

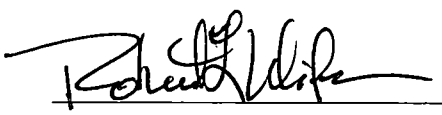
(10/2/14 email from P. Harrill to trial court). The trial court accepted Debtor's position and excluded the affidavit and exhibits. (Stay Order at 1).

It is axiomatic that the admission and exclusion of evidence resides in the discretion of the trial court. Under the particular circumstances of this case, as set forth above, Royals submits that the trial court erred in excluding the affidavit and exhibits. In ambush style, Debtors waited until the close of the evidence in a merits trial to raise the non-merits issue of continued foreclosure intervention, despite having withdrawn their pre-trial motion on the same issue. The excluded evidence is highly relevant to this non-merits issue, and it was timely presented under the particular circumstance of this case. Accordingly, and assuming this Court reaches the merits of this issue and would reverse the trial court, it is respectfully submitted that this Court should also reverse the trial court's evidentiary ruling and consider the affidavit and exhibits in reviewing the merits of this issue or remand this non-merits issue for additional evidence taking and decision by the trial court.

CONCLUSION

The 2011 Administrative Order did not and could not create a state law right to foreclosure intervention, and it is undisputed that Debtors did not qualify for any federal right to foreclosure intervention. In any event, it is the law of this case that Royals complied with the 2011 Order. For these reasons, and for the other reasons set forth above, it is respectfully submitted that this Court should affirm the appealed orders.

Respectfully Submitted,



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December 5, 2016

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
Joseph M. Strickland, Master In Equity

Case No. 2012-CP-40-7878
Appellate Case No. 2015-000367

Royals Portfolio, LLC, an assignee of Bank of America, N.A., formerly known as NationsBank, N.A., which is Successor by Merger to NCNB South Carolina, ...Respondent,

v.

Charlie Kelly and Dorothy Simpson,..... Appellants.

CERTIFICATE OF SERVICE

I, Kathleen W. Fay, an employee of McNair Law Firm, certify that I served the **Initial Brief of Respondent** and **Designation of Matter to Be Included in Record on Appeal**, by placing true and correct copies in the U.S. Mail, sufficient postage pre-paid to Appellants' counsel at the addresses shown below, on December 5, 2016:

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Re: Royals Portfolio, LLC -v- Charlie Kelley and Dorothy Simpson
Appellate Case No. 2015-000367

Dear Madam Clerk:

Enclosed for filing, please find the original and one copy of the Initial Brief of Respondent and the original and one copy of Respondent's Designation of Matter to Be Included in Record on Appeal. Please file the brief and designation in your office and return the file stamped extra copies to me in the envelope provided. By copy of this letter we are serving opposing counsel with copies of the brief and designation.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.

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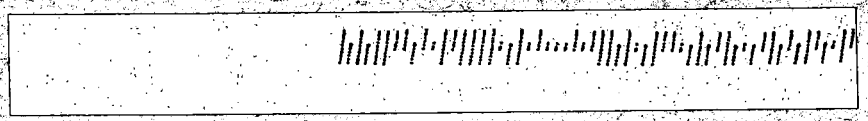

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