

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
DeAndrea Benjamin, Circuit Court Judge

Case No. 2016-001019

**RECEIVED**

MAY 24 2017

SC Court of Appeals

U.S. Bank, National  
Association, as trustee for the  
Holders of the Banc of  
America Funding Corporation,  
2008-FTI,

Respondent,

v.

Rhonda Lewis Meisner a/k/a  
Rhonda L. Meisner, Bank of  
America, N.A. and SCBT

Appellant.

APPELLANT'S REPLY BRIEF

May 24, 2017

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## APPELLANT'S INTRODUCTION OF ISSUES ON APPEAL

As an initial matter, the appellant avers all issues raised in her appeal are properly before this Honorable Court of Appeals. First, while the issues of standing and real party in interest were determined to be interlocutory by this Honorable Court of Appeals, this determination did not remove the fact the issues were properly raised and ruled on by the lower court. In fact, the Order, from this Honorable Court, specifically noted that the appeal was based on both the lower Court's denial of the dismissal of the complaint and the lower Court's denial of the S. C. R. Civ. P. Rule 59 (e) motion.

Second, the respondents did not make a motion or argument for the exclusion of the S.C.R. Civ. P. Rule 59 (e) from the trial Court or from this Honorable Court's consideration either during a post-hearing motion or during the pendency of the appeal or prior to the issuance of this Honorable Court's remitter.

Third, the South Carolina Supreme Court has previously held a **second** S.C. R. Civ. P. Rule 59-e motion that contains some of the same arguments as the first S.C. R. Civ. P. Rule 59-e motion does not toll the time for appeal. Coward Hund, 336 S.C. 1, 518 S.E.2d 56; Quality Trailer, 349 S.C. 216, 562 S.E.2d 615; and Collins Music, 353 S.C. 559, 579 S.E.2d 524. As such, the trial Court's denial of the first S.C. R. Civ. R. 59-e denial did not toll the time for appeal; therefore, to

avoid losing the opportunity to appeal the issue, it was necessary to file the appeal prior to the Lower Court's ruling.

Finally, it is the "first amended complaint" that is the subject of this appeal.

## **APPELLANT'S POSITION OF STATEMENT OF THE CASE**

### **A. Appellant's reply to "U.S. Bank Filed for Foreclosure because of Appellant's Default on Her Loan."**

U.S. Bank, National Association, as trustee for the Holders of the Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1 ("U.S. Bank"), did not own the note or the mortgage at the time they filed the foreclosure action pursuant to their own court filings; therefore, they assumed an already defaulted loan and as such suffered no injury.

**(R. \_\_)**. Bank of America, N.A. ("Bank of America"), U.S. Bank's predecessor in title claims an ownership interest in the very note U.S. Bank seeks to foreclose.

**(June 10, 2014 T. p. 3:10-15) (R. \_\_)**. U.S. Bank, by the facts alleged in the complaint, and argued in open court may be considered a third- party debt collector due to the fact they assumed the note and mortgage after the alleged default occurred with another company. **(December 16, 2015 T. p. 4:10-12) (R. \_\_)**.

Meisner purportedly defaulted on a loan to their predecessor in title, Bank of America and not with any loan owned by U.S. Bank. **(December 16, 2015 T. p. 4:10-12) (R. \_\_)**. Additionally, Meisner argues because the requirement to debit her

bank account, as elected as a term in the note, carried the obligation to debit to the new owner of the note. (R.\_\_). U.S. Bank was not a party to the contract between Bank of America and Appellant Meisner, therefore they assumed or purchased an already defaulted loan and a breached contract and never suffered any injury in fact. (R.\_\_). Additionally, Bank of America, claimed an interest in not only the note and mortgage initiated in 2005, as the respondent notes in its initial brief, **(Initial brief of Respondent p. 1 last line; p.2.1)**, but also claimed an interest in the specific note that is subject of this appeal. **(Case No. 2013- CP- 40-07144 Answer of Bank of America).**

**B. Appellant's Reply to "Meisner Files a Motion to Dismiss, Which the Trial Court Denies."**

The Appellant's Initial Brief accurately identified the motions by which she sought relief. **(App. In. Br. P. 3:8-12)** This is because the scrivener's error in the lower court's written motion, was corrected in the hearing before the Court. **(June 10, 2014 T. p. 2:17-21)** The Court accepted the correction via acknowledgement. **(June 10, 2014 T. p. 2:22-24)**. The Respondent noted the scrivener's error in its initial brief; however, importantly, the respondent did not note the Appellant's correction of the errors in front of the Court. **(In. Br. of Resp. p. 2 n. 1). (June 10, 2014 T. p.2:17-21) (R.\_\_)**. The memorandum in support of the motion to dismiss also specifically addressed the fact that Bank of America claimed an interest in the

note and mortgage and noted the fact the assignment that purportedly transferred the instrument was notarized the day before in Nevada and California. **(Def. Memo in support of Motion to dismiss p.3:17-22) (R\_\_.)** The memo in support of the motion to dismiss was served on the defendants and filed with the Court in support of the motion to dismiss prior to the June 10, 2014 hearing and not only notes the duplication of the cases but specifically notes that both Bank of America and U.S. Bank claim ownership of the note and mortgage. **(Memo in support of Motion to dismiss p. 4: 16-19) (R.\_\_)**.

The question of real party in interest and whether the plaintiff had standing was brought up in the Def's Memorandum in Support of the Motion to Dismiss and was filed and served on the plaintiff prior to the June 10, 2014 hearing and therefore was properly before the Court. **(R\_\_)**. The arguments were reiterated before the Court in the hearing held on June 10, 2014. **(R.\_\_)**. It was specifically pointed out to the Court that the assignments were attached as exhibits to the memorandum in support of dismissal, which pursuant to the Court's order was filed prior to the June 10<sup>th</sup> hearing. **(June 10, 2014 T. p. 9:13-25; p, 10:1-15)**.

The appellant avers that pursuant to S.C.R. Civ. P. Rule 12 (b), "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or *motion*". (emphasis by Appellant). Here, the claims for dismissal were referenced in both the memorandum in support of the motion to

dismiss and the oral argument before the Court, with a court reporter present; therefore, **all** the reasons for the motion to dismiss were properly before the Court.

**C. Appellant’s Reply to “The First Order of Reference is Entered but Subsequently Vacated.”**

Respondents assert the Order of Reference signed by the Honorable Jeanette McBride was done so inadvertently. Whether the respondents filed the motion to strike and for mandatory Order of Reference was intentional and a violation of the South Carolina Rules of Civil Procedure is a question of law, a determination in the affirmative would provide a basis for a jury demand via an abuse of the foreclosure process. The appellant avers because the respondent objected to the Master in Equity’s vacatur of the referral and argued before the Honorable DeAndrea Benjamin that the Clerk is required to sign the referral based on Rule 53, the motion for referral was intentional. (**December 16, 2015 T. p. 14:19-25; p. 15:1-8**). This is because the referral contained findings of fact and conclusions of law. This argument was made in the “first amended complaint”, the memorandum in opposition of the motion to strike the jury demand, and in oral argument. (R\_\_.)

**D. Appellant’s Reply to “Meisner Files an Amended Answer and Counterclaims and U.S. Bank Obtains an Order of Mandatory Reference.**

After a hearing before the Honorable Casey Manning, who granted appellant’s motion to amend the counterclaims and the cross claims after the Master in Equity determined the submitted mandatory reference was improper. (R\_\_). The, “first

amended complaint” which included the prayer for relief from breach of contract, a breach of contract accompanied by a fraudulent act and the abuse of process claims, also contained a request for the Court to “determine a question in actual controversy between or among the parties as to their respective rights and obligations under a note AND mortgage pertaining to real property...and to the Appellant filed an amended answer and amended counterclaims and crossclaims.

Respondents characterize the amended answer and counterclaim by the appellant as solely equitable in nature, the appellant disagrees with this assertion. A review of the declaratory judgment request in this case indicates the relief requested includes, a determination of the rights and obligations of the parties under a contract, which is a legal determination. Importantly, the respondent is not a party to the contract the appellant requests the Court to interpret. which includes a request for declaratory judgment that “determines the real party in interest.”

**Resp. Ini. Br. P. 5:5-6. (R. \_\_).**

The Honorable DeAndrea Benjamin determined that the counterclaims were permissive; however, if Bank of America was determined to be the breaching party based on the terms of the contract, foreclosure is not available to the breaching party as a remedy. (R \_\_). The “first amended complaint” plainly states that Appellant Meisner was not the breaching party and that the respondent’s

predecessor in title, Bank of America was the breaching party, which would preclude foreclosure.

## **REPLY TO THE RESPONDENT'S ARGUMENT**

### **I. THE ISSUE OF WHETHER THE FORECLOSURE ACTION SHOULD BE DISMISSED DUE TO U.S. BANK'S ALLEGED LACK OF STANDING IS PRESERVED FOR REVIEW.**

First, and most importantly, this Honorable Court dismissed the previous appeal based on the Denial of the Motion to Dismiss and the Denial of The S.C. R. Civ. P. Rule 59(e) for the sole reason that the appeal was interlocutory in nature and therefore not immediately appealable. The ruling by this Honorable Court did not address the Court's claim of non-receipt of a copy of the filed S. C. Civ. P. Rule 59 (e) motion and the respondents did not challenge or correct the ruling either in post-trial motions, during the appeal process or in their initial brief. The respondents could have challenged the jurisdiction of the Court of Appeals in the previous dismissal; however, they did not do so and the remitter was issued. Therefore, it is the law of the case that the issues were raised and ruled on by the lower court.

This Court has also previously held if the questions on appeal affects a substantial right, the case is immediately appealable. Here, even though

interlocutory issues are included with immediately appealable issues, for the sake of judicial economy, this Honorable Court should consider all the issues in the appeal.

For purposes of S.C. Code Ann. §14-3-330 an order affects a substantial right when it “(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof of any pleading in any action [.]”

This appeal asks this Honorable Court of Appeals to answer the question of whether the counter claims and cross claims are compulsory and entitle the appellant to a jury trial and is therefore immediately appealable. Appellant avers the cross claims and counter claims are compulsory and therefore immediately appealable. If this Honorable Court of Appeals agrees that the respondent does not own the note and the mortgage, then the respondent lacks standing to pursue the action.

The Appellant avers because the Trial Court ruled on the Motion to Dismiss and the Motion to Alter and Amend, the issue of standing and real party in interest is preserved for this Honorable Court’s review. The Order of Dismissal from the Court of Appeals did not make any determinations or rule that the lower Court’s failure to receive a copy of the motion was jurisdictional in nature and the

respondents did not challenge this ruling; therefore, the respondent waived the arguments, as the remitter was remitted. (R. \_\_).

**The issue of Standing and Real Party in Interest was properly before the Court.**

S.C. R. Civ. P. Rule 7 (b)(1) provides that an application to the court for an order shall be by motion which, *unless made during a hearing or trial in open court with a court reporter present*, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. In this case, the Appellant requested the case be dismissed for multiple reasons by motion, by memorandum and in open court, *with a court reporter present*. The Circuit Court denied the dismissal of the complaint based on S. C. R. Civ. P. Rule 8; However, S.C.R. Civ. P. Rule 7(b) (1) indicated all the arguments made to the Court during the Motion to Dismiss hearing, outlined in the Memorandum in Support of the Motion to Dismiss, and argued in Oral Argument *with a court reporter present* were properly before the Court and therefore included in this ruling.

Because the issues of standing and real party in interest were raised to the Court and ruled on, they are preserved for review. Additionally, because this Court has

previously ruled a second S.C.R. Civ. P. Rule 59 (e) does not toll the time for appeal and the mode of trial is a substantial right, the appellant was required to appeal or lose the opportunity to do so.

## **II. THE TRIAL COURT ERRED IN STRIKING MEISNER'S DEMAND FOR A JURY TRIAL.**

The respondent claims the prayer for relief is only equitable in nature and this simply is not so. The broad relief requested by the declaratory judgment which includes:

- the request to declare U.S. Bank as a third- party debt collector pursuant to article 3 of the UCC.
- a finding that U.S. Bank as a third- party debt collector abused the foreclosure process and warrants actual and punitive damages.
- A finding that co-defendant slandered the title
- A finding that Bank of America's failure to remove liens associated with the 2005 mortgage violated S.C. Code Ann. §29-3-310.
- Liens associated with SCBT be removed from the lis pendens
- A determination that the counter claims and the cross claims warrant a jury trial and for transfer to the jury roster and for referral to ADR.
- And for an order of all other such relief as may be appropriate and available under the law..., for attorney fees or the commensurate amount

of damages of time spent and punitive judgments against the plaintiff and the co-defendant.

The prayer for relief is sufficiently broad such that not only equitable remedy is demanded. Specifically, whether the terms of the contract require the bank to continue drafting the payments and if so, then the bank is the breaching party.

(R\_\_). If the bank is determined to be the breaching party then whether attorney's fees and costs are available pursuant to the terms of the note agreement.

Here, the respondent has requested attorney's fees associated with the foreclosure action based on the contract between the predecessor in title, Bank of America, who the appellant alleges breached the contract by not debiting her payments as required by the note. The appellant is unaware of a statute that provides for attorney's fees in South Carolina absent a contract for mortgage foreclosure actions. Because the declaratory judgment action requests a determination of whether attorney's fees are available under a contract this is an action at law. DePass v. Piedmont Interstate Fair Ass'n, 217 S.C. 38, 59 S.E.2d 495 (1950). (action for collection of attorneys' fee charged pursuant to contract between attorney and client constitutes an action at law giving rise to a right to jury trial)

While the attorney's right to collect the attorney's, fees awarded based on the proceeds of the contract (such as in a foreclosure action) is one in equity; the question of whether the contract provides for a third party (U.S. Bank) to collect

attorney's fees from a contract when the predecessor in title is alleged to have breached the contract is a question of law. This determination rests solely on the determination that an amount owed on the note exceeds the amount owed by the breaching party to the non-breaching party. Just as the question of whether a party that breaches a note agreement can invoke the equitable right of foreclosure is a legal question. In foreclosure actions, the amount owed is required to be determined prior to the foreclosure.

**A. The Appellant has a Right to a Jury Trial when counterclaims for Declaratory Judgment affect the right of the Plaintiff to Foreclose.**

In N.C. Fed. Sav. & Loan Assn, the Supreme Court of South Carolina held that a breach of an oral agreement purporting to modify a note that the bank was foreclosing on was logically related to the enforceability of the note and was thus compulsory. N.C. Fed. Sav. & Loan Assn, 298 S.C. 518–19, 381 S.E.2d at 905. Additionally, in C & S Real Estate Servs., Inc. v. Massengale, the Court found “Although the counterclaim includes a prayer for actual and punitive damages, the only actual damages alleged are those of Father in incurring attorney's fees and expenses to defend the action. The Whites failed to allege any damages they were seeking. Although Father may have been entitled to a jury trial, he failed to appeal the referee's order and he is not a party to this appeal.” C & S Real Estate Servs.,

Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). In C&S, the Court embraced actual expenses such as attorney's fees, costs and damage to property via the lis pendens entitled parties to a jury trial. Here, the appellant requested such fees in addition to punitive damages and equitable remedies.

Most importantly in the declaratory judgment action is the request to determine that U.S. Bank is a third-party debt collector requiring an interpretation of the UCC. Taken the contract interpretation, cannot simply be categorized as equitable. Particularly when equitable foreclosure requires a determination that a certain amount is owed to the plaintiff more than the amount owed by the plaintiff prior to judgment and sale.

**B. The Appellant has a Right to a Jury Trial when the abuse of process claim implicates the due process clause and claims special damages as part of the prayer for relief.**

The appellant has alleged that based on the filings by the respondent, Bank of America appears to be the real party in interest because the assignment to U.S. Bank is defective. The appellant has claimed actual, special, and punitive damages against the respondent. (R\_\_ ) As such the claim is compulsory pursuant to C&S because a mortgage foreclosure lawsuit is the process to enforce the note and the mortgage and if this process results in tort damages more than the amounts owed, then there is no basis for the equitable remedy of foreclosure. This argument was made in the initial brief. (R\_\_ ) Additionally, the initial brief argued because the

actions of the clerk of court violated the law, the appellant should be entitled to a jury trial. The determination of whether the respondent is a third -party debt collector means the litigation conduct would be held against the respondent and was also argued in the initial brief and specifically categorized the actions of the respondent as a tort and not an equitable injury. (R\_\_). The argument that because the “abuse of process” tort is capable of replication and creates a danger was also presented to the Court and argued on appeal. (R\_\_). Additionally, This Court can interpret novel arguments without any deference to the Court below.

**C. The appellant has a right to a trial by jury when the damages by the cross claimant are compulsory**

As an initial matter, the respondent suggested no argument was made in the initial brief that the appellant was entitled to a jury trial. However, a review of appellant’s initial brief plainly states the appellant is entitled to a jury trial via statute S.C. Code Ann. §29-3-310 and §29-3-320. Additionally, the appellant specifically alleges Bank of America claimed an ownership interest in the note and mortgage erroneously. (R\_\_) The statement that the appellant was entitled to a jury trial also noted the specific statute and the mechanism by which to make the claim.

Generally cross claims are permissive; however, in this case throughout the appeal, the appellant argued the parties are misaligned due to the defective assignment from Bank of America to U.S. Bank a central and critical issue on appeal is who owned the note when and whether their ownership in the note and

mortgage and their actions in these proceedings provides a basis for remedy or a basis for punishment.

### CONCLUSION

As such, the appellant avers all the counter claims and cross claims are compulsory and legal at this juncture until a determination of when the true breach of the contract occurred and by whom due to the underlying question of parties and how they should be aligned. For the reasons and the authorities stated above and in the initial brief, this Court should dismiss the claims against the appellant for lack of standing and remand the actions against the respondent and counter claimant Bank of America for a jury trial.

May 24, 2017

Respectfully Submitted,



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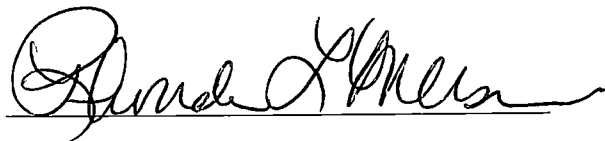
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Rhonda Lewis Meisner a/k/a  
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Appellant.

CERTIFICATE OF SERVICE FOR REPLY BRIEF

I certify that I have served a copy of the initial brief and designation of matter on the following parties: **Magalie Creech Finkel Law Firm 4000 Faber Place Drive, Suite 450 North Charleston, SC 29405 Ed Grimsley c/o Grimsley Law firm, LLC P.O. 11682 Columbia, SC 29211 Jonathan Milling 1614 Taylor Street Columbia, SC 29201. Jake S. Barker Graybill Lansche and Vinzani 225 Seven Farm Drive suite 107 Charleston, SC 29492 Trent M. Grissom McGuire Woods, LLP 201 N.Tryon Street Suite 3000 Charlotte, NC 28202** by mailing a copy via U.S. Mail postage pre-paid to their counsel of record as listed above on this certificate of service:



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The Appellant certifies that her initial brief and her reply brief comply with Rule 208(b).

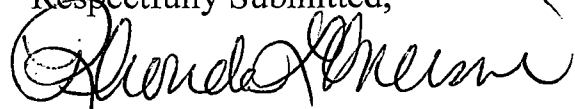
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