

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM Horry County  
Master-in-Equity

The Honorable Cynthia Graham Howe

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SC Court of Appeals

Appellate Case No. 2017-000884  
Civil Action No. 2012-CP-26-04695

Deutsche Bank National Trust Company, as Trustee on  
Behalf of the Certificateholders of Morgan Stanley ABS  
Capital I Inc. Trust 2004-NC8 for Mortgage Pass  
Through Certificates, Series 2004-NC8, .....

Respondent,

v.

James T. Burr a/k/a James Burr and Grand Strand  
Water & Sewer Authority, .....

Defendants

Of whom James T. Burr a/k/a James Burr is the  
Appellant, .....

Appellant.

**Initial Brief of Respondent**

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## Statement of Issues on Appeal

- I. **Rule 43(l), SCRCP, did not preclude the master from granting summary judgment to Deutsche Bank on each of Burr's counterclaims.**
  - a. **Burr failed to preserve this Rule 43(l), SCRCP, argument for appellate review by presenting a different argument on appeal than the one presented to the circuit court.**
  - b. **Even if this argument were properly preserved, this Court should still affirm because Burr misrepresents the applicability of Rule 43(l), SCRCP.**
  - c. **This Court should reject Burr's argument because it ignores the fact that Deutsche Bank presented additional evidence to the master prior to the grant of summary judgment.**
  
- II. **Because Burr failed to introduce any evidence sufficient to create a genuine issue of material fact as to the alleged refinance, the master properly granted summary judgment on Burr's counterclaims and affirmative defenses.**

## Statement of the Case and Statement of the Facts<sup>1</sup>

In this foreclosure action, Appellant James T. Burr a/k/a James Burr (“Burr”) appeals the grant of partial summary judgment to Respondent Deutsche Bank National Trust Company, as Trustee on Behalf of the Certificateholders of Morgan Stanley ABS Capital I Inc. Trust 2004-NC8 for Mortgage Pass Through Certificates, Series 2004-NC8 (“Deutsche Bank”), as to each of Burr’s counterclaims and affirmative defenses. {Notice of Appeal, R. \_\_\_\_}. Burr based each counterclaim claim and defense on an alleged agreement to refinance his loan in 2008 that was never consummated. {Answer and Counterclaims, R. \_\_\_\_}. After significant delay of the matter caused by Burr and Burr’s failure to respond to written interrogatories, requests for production, and requests for admission, the master ultimately found no genuine issues of fact existed as to Burr’s counterclaims or affirmative defenses and granted summary judgment to Deutsche Bank. {Order Granting Deutsche Bank’s Motion for Partial Summary Judgment filed September 30, 2016, R. \_\_\_\_}.

Deutsche Bank commenced this foreclosure action against Burr in June 2012. {Complaint, R. \_\_\_\_}. Burr answered and asserted counterclaims against Deutsche Bank for an accounting, an alleged violation of the South Carolina Unfair Trade Practices Act, and negligent misrepresentation and affirmative defenses for unclean hands, estoppel, and novation. {Answer and Counterclaims, R. \_\_\_\_}. The action was stayed to allow the parties to pursue foreclosure intervention. {Order Staying Case, R. \_\_\_\_}. The court restored the matter to the active docket in July 2015. {Order Restoring Case to Active Docket, R. \_\_\_\_}.

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<sup>1</sup> Deutsche Bank combines the Statement of the Case and Statement of Facts due to the overlap between the two sections in order to eliminate repetition and for ease of reference.

The parties then referred the matter by consent to the Honorable Cynthia Graham Howe, Master-in-Equity for Horry County, South Carolina. {Order of Reference, R. \_\_\_\_}. Deutsche Bank moved for partial summary judgment as to each of Burr's counterclaims and affirmative defenses. {Motion for Partial Summary Judgment filed July 8, 2015, R. \_\_\_\_; Memorandum in Support of Motion for Partial Summary Judgment filed December 10, 2015, R. \_\_\_\_}. The master set a hearing on the motion for December 15, 2015. {Email from court to parties dated December 8, 2015, R. \_\_\_\_}.

Prior to that hearing date, Burr did not file a response in opposition to Deutsche Bank's motion for partial summary judgment, but his attorney instead submitted an affidavit stating that Burr could not oppose the motion because Burr would not communicate with his attorney. {Affidavit of Radeker, R. \_\_\_\_}. In addition, Burr's counsel sought a continuance because counsel had been unable to get in touch with Burr and indicated that counsel intended to withdraw as Burr's counsel. {Email to court from D. Radeker dated Dec. 10, 2015, R. \_\_\_\_}. Burr's counsel filed a motion to be relieved as counsel one day prior to the hearing date. {Motion to be Relieved as Counsel, R. \_\_\_\_}. The master allowed the continuance by email.

Thereafter, Burr's counsel withdrew the request to be relieved as counsel and requested a new hearing date with the court. {Email from D. Radeker to court dated March 10, 2016, R. \_\_\_\_}. The master heard the matter on May 12, 2016. {Transcript dated May 12, 2016, R. \_\_\_\_}. At that hearing, counsel for Burr conceded that the statute of limitations barred the negligent misrepresentation claim.<sup>2</sup> {Trans. dated May 12, 2016, p. 36, R. \_\_\_\_; Order dated September 30, 2016, ¶ 12, R. \_\_\_\_}. After the hearing, the master entered a Form 4 order that

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<sup>2</sup> Burr did not appeal the dismissal of that claim. Thus, the negligent misrepresentation is not before this Court on appeal.

denied the motion to allow time for the parties to conduct discovery on the factual allegations in the counterclaims. {Form 4 Order dated June 8, 2016, R. \_\_\_\_; Transcript dated September 22, 2016, p. 17, R. \_\_\_\_}.

Deutsche Bank served written interrogatories, requests for production, and requests for admission on Burr on the same day as the issuance of the order directing discovery. {Transcript dated September 22, 2016, p. 17, R. \_\_\_\_; Motion for Partial Summary Judgment Ex. D, R. \_\_\_\_}. Among other requests, Deutsche Bank's requests for admissions asked the following:

4. Admit Defendant did not sign a promissory note concerning the refinance loan that he alleges he applied for in the Answer and Counterclaim and that forms the basis of his counterclaims and affirmative defenses.

5. Admit that Defendant did not sign a mortgage concerning the refinance loan that he alleged he applied for in the Answer and Counterclaim and that forms the basis of his counterclaims and affirmative defenses.

6. Admit Defendant has never made a payment on the refinance loan that he alleges he applied for in his Answer and Counterclaim and that forms the basis of his counterclaims and affirmative defenses.

{Request for Admissions, R. \_\_\_\_}. Burr did not respond to Deutsche Bank's discovery requests within the applicable deadline, which expired on July 13, 2016. {Transcript dated September 22, 2016, p. 17, R. \_\_\_\_}. As a result, Burr admitted, pursuant to Rule 36(a), SCRCF, that he did not sign a promissory note, did not sign any mortgage, or make any payments on the alleged refinance loan that formed the sole factual basis for his counterclaims and affirmative defenses.

After Burr's failure to respond to discovery, Deutsche Bank renewed its motion for partial summary judgment and also sought dismissal for failure to prosecute. {Motion to Dismiss for Failure to Prosecute and for Partial Summary Judgment dated July 25, 2016, R. \_\_\_\_}. The

master conducted a hearing on September 22, 2016. {Notice of Hearing, R. \_\_\_\_; Trans. dated September 22, 2016, R. \_\_\_\_}. Burr relied exclusively on his affidavit to oppose the motion for partial summary judgment. {Trans. dated September 22, 2016, p. \_\_\_\_, R. \_\_\_\_}. That affidavit merely stated that Burr had an agreement to enter a refinance of the loan at some point in the future. {Affidavit of Burr filed March 15, 2016, ¶5, R. \_\_\_\_}. Burr further admitted in the affidavit that the refinance never consummated.<sup>3</sup> {Affidavit of Burr filed March 15, 2016, ¶6, R. \_\_\_\_}.

Despite several invitations from the Court to produce evidence that the refinance referenced in the affidavit was executed, Burr never submitted any evidence concerning any application for a refinance or the terms of the refinance loan that he claimed he entered into in 2008. {Trans. dated September 22, 2016, p. 10, 21-22, R. \_\_\_\_}. Importantly, Burr's counsel admitted that Burr had no such evidence and that Burr's failure to produce any such documents in response<sup>4</sup> to the discovery requests, including the deemed admissions, precluded Burr from

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<sup>3</sup> In his Statement of Facts, Burr claims that his affidavit is “[t]he only factual material in the record.” {Initial Br. of App. p. 3}. This position is false. Burr's failure in response to Deutsche Bank's discovery to produce any documents related to the application and terms of the alleged refinance constituted evidence for the master to consider. Rule 56(c), SCRPC; See, e.g., Higgins v. Medical University of S.C., 326 S.C. 592, 600, 486 S.E.2d 269, 272 (Ct. App. 1997) (emphasis added) (“When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits”); see also Gould v. O'Shaughnessy Realty Co., 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct. App. 2008); Rife v. Hitachi Const. Machinery Co., Ltd., 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005); BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (Ct. App. 2005); Mulherin-Howell v. Cobb, 362 S.C. 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005). Moreover, Burr failed to answer any requests for admissions. Those deemed admissions qualified as evidence that the master considered in issuing the ruling. Id.

<sup>4</sup> Burr provided responses to the interrogatories and request for production the day before the hearing. Burr produced no documents other than his affidavit in this matter.

establishing a genuine issue of material fact as to whether the parties entered into a loan refinance agreement that formed the sole basis of each of Burr's counterclaims and affirmative defenses.

{Trans. dated September 22, 2016, p. 10, 21-22, R. \_\_\_\_}. Burr informed the master that:

The Court: I'll just ask you: As an officer of the Court, is there anything that you produced that makes a difference as to your counterclaims?

Counsel for Burr: No, Your Honor.

{Trans. dated September 22, 2016, p. 10, R. \_\_\_\_}. Counsel for Burr admitted to the master that:

The Court: [Counsel], is that correct? There is no application for a refinance?

Counsel for Burr: Your Honor, I would need a moment to further look at the discovery responses we had.

The Court: Would you, please? . . . Take any time you need to see if that's an application for a refinance anywhere that you see in your file.

Counsel for Burr: Thank you for the opportunity. I do not see the completed application in the file.

{Trans. dated September 22, 2016, p. 21-22, R. \_\_\_\_}. As a result, the master concluded that:

I'm going to grant the motion . . . . There's been no application for refinance based upon the attorney's own admission that nothing in the discovery responses makes any difference, and based upon [Burr's] failure to respond to the requests for admissions. I don't see where there's any material fact that - genuine issues of material fact to go to trial on. There was no meeting of the minds as the refinance or loan modification.

{Trans. dated September 22, 2016, p. 21-22, R. \_\_\_\_}.

The master thereafter entered an order granting partial summary judgment on each of Burr's remaining counterclaims and affirmative defenses to Deutsche Bank. {Order filed

September 30, 2016, R. \_\_\_\_}. Burr moved to reconsider. {Motion to Reconsider filed October 31, 2016, R. \_\_\_\_}. Deutsche Bank opposed the motion to reconsider. {Memorandum in Opposition to the Motion to Reconsider, R. \_\_\_\_}. The master denied the motion, finding, inter alia, that:

The Order correctly held there is no genuine issue of material fact precluding summary judgment. All of Burr's counterclaims and affirmative defenses were based on an alleged agreement to refinance his loan in 2008 that was never consummated. Despite several invitations from the Court, Burr never submitted any evidence concerning his application for, or the terms of, the refinance loan that he alleges he entered into in 2008. In fact, Burr's counsel admitted at oral argument that no such evidence exists. Burr's counsel also admitted that Burr's responses to Deutsche Bank's discovery requests did not create an issue of material fact.

{Order denying Motion to Reconsider dated March 15, 2017, R. \_\_\_\_}. The appeal followed. {Notice of Appeal dated April 17, 2017, R. \_\_\_\_}.

### Argument

#### **I. Rule 43(l), SCRPC, did not preclude the master from granting summary judgment to Deutsche Bank on each of Burr's counterclaims.**

Burr argues, for the first time, that Rule 43(l), SCRPC, precluded the master from granting summary judgment because the master previously denied Deutsche Bank's motion for summary judgment on the same set of facts. {Initial Br. of App. p. 6-8}. This argument lacks merit for several reasons. First, Burr did not preserve the issue for appellate review. Second, Rule 43(l), SCRPC, did not apply to the grant of summary judgment by the plain and unambiguous language of the rule. Third, Rule 43(l), SCRPC, was inapplicable because additional evidence was presented to the master from the time of the first hearing to the time of the second hearing in the form of Burr's failure to respond to interrogatories, requests for

production, and requests to admissions. Any of these reasons provide sufficient basis to affirm the master's order granting summary judgment to Deutsche Bank.<sup>5</sup>

- a. **Burr failed to preserve this Rule 43(l), SCRCPP, argument for appellate review by presenting a different argument on appeal than the one presented to the circuit court.**

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). As noted by our Supreme Court:

The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

F'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Moreover, the issue raised by the party must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the circuit court. Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

Notably, the issue raised on appeal must be the same as the issue raised to the circuit court. State v. Ward, 374 S.C. 606, 615-615, 649 S.E.2d 145, 150 (Ct. App: 2007). Imposing

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<sup>5</sup> Burr's interpretation of Rule 43(l), SCRCPP, borders on frivolous. Rule 43(l), SCRCPP, simply does not apply to the grant of summary judgment by the master as established in sections I.a., I.b., and I.c. herein.

this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On, 338 S.C. at 422, 526 S.E.2d at 724.

Burr failed to adhere to these settled rules. Burr argues that Rule 43(l), SCRPC, precluded the master from granting summary judgment because the master previously denied Deutsche Bank's motion for summary judgment on the same set of facts. {Initial Br. of App. p. 6-8}. Burr, however, did not raise this issue to the master at any time during the summary judgment hearing.

Instead, Burr advised the master that Rule 43(l), SCRPC, argument to the master was limited to the fact the parties were limited to arguing the "law concerning whether there is an issue of material fact on [Burr's] counterclaims. {Trans. dated September 22, 2016, p. 17, R. \_\_\_\_}. The entire colloquy established that no other argument was presented to the master regarding Rule 43(l), SCRPC, providing:

Counsel for Burr: Your Honor, as to the other claims left over on the motion for summary -- partial summary judgment, Your Honor, we would in part and create reference to Rule 43 -- excuse me -- of the Rules of Civil Procedure which provides that if any motion is made to any judge and denied in whole or in part or granted conditionally, no subsequent motion on the same state of facts can be made to any other judge in that action.

Your Honor, you were here so you were able to consider these things in discovery, and then provided at that time when that prior hearing was had.

There were several items that were left over and there are items that were expressly denied as to summary judgment.

The Court: But my point is that that hearing was, y'all need to do some more discovery. So I contemplated doing more discovery and bringing the motion for summary judgment again after the discovery.

Counsel for Burr: Right, Your Honor. Why I'm bringing this up is really to clarify that we have counterclaims that were denied to our client that to be unfair trade practices, to my understanding, but that we have left over other counterclaims that were held before discovery; is that correct?

The Court: That's correct. That's correct.

Counsel for Burr: Your Honor, here today we are not -- we are simply claiming that if there was going to be an opportunity for to us provide that discovery, we have done so, they have considered it. And we're ready today to argue the law concerning whether there is an issue of material fact on those remaining counterclaims.

{Trans. dated September 22, 2016, p. 16-17, R. \_\_\_\_ (emphasis added)}. The argument presented to the master differs from the argument presented to this Court. Thus, our rules of preservation preclude this Court from considering this argument.

Burr's attempt to present his appellate argument in his Rule 59, SCRPC, motion does not preserve the issue for appellate review. A party cannot use a Rule 59, SCRPC, motion to advance an issue that the party could have raised to the circuit court prior to judgment but did not do so. See, e.g., Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (affirming the circuit court because the "circuit court, relying on well-settled precedent, declined to reach this issue because it was improperly raised for the first time in the Rule 59(e) motion to the trial court"); Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). Thus, our preservation rules required Burr to raise this argument at the first opportunity, namely the hearing on the motion for summary judgment. Burr failed to do so and was precluded from raising the argument for the first time in the motion to reconsider. As a result, the argument remains unpreserved for appellate review.

- b. **Even if this argument were properly preserved, this Court should still affirm because Burr misrepresents the applicability of Rule 43(l), SCRCP.**

Burr argues that Rule 43(l), SCRCP, precluded the master from granting Deutsche Bank's motion for summary judgment because the master improperly ruled on the same motion twice. {Initial Br. of App. p. 6-8}. This argument is frivolous in light of the plain and unambiguous language of Rule 43(l), SCRCP.

Courts interpreting the South Carolina Rules of Civil Procedure apply the same rules of construction used to interpret statutes. Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003); see also Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006) (applying that premise to hold the plain language of a rule of civil procedure controlled the issue). If the language of the rule is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted) (“[I]f a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning”); Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002). Courts will reject an interpretation leading to an absurd result clearly unintended by language employed. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

The plain and unambiguous complete text of Rule 43(l), SCRCP, which Burr fails to include in his argument to this Court, did not bar the master from granting the motion for summary judgment. The rule provides in full that:

If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action.

Rule 43(l), SCRCPP (emphasis added). Under the plain and unambiguous language of the rule, it applies to a situation in which one judge denies a motion and then another judge hears the motion a second time on the same grounds.

That did not occur in this matter. The same master addressed Deutsche Bank's motion for summary judgment on each occasion. The master initially ruled that the parties should complete discovery on the claims at issue in the motion for summary judgment. {Trans. dated September 22, 2016, p. 17, R. \_\_\_\_}. Then, the same master ruled on the motion after completion of discovery. {Trans. dated September 22, 2016, p. 17, R. \_\_\_\_}. Thus, Rule 43(l), SCRCPP, did not apply to this matter.

Moreover, Burr's argument would render the "any other judge" language used by the rule as surplusage or superfluous. Such a construction would be in error. See, e.g., CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous"); Steinke v. S. Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999) (stating that courts should "avoid a construction that would read a provision out of a statute"). Thus, Burr's argument ignores the unambiguous language of the rule and violates our rules of construction. This Court should reject the argument and affirm the grant of summary judgment.

- c. **This Court should reject Burr’s argument because it ignores the fact that Deutsche Bank presented additional evidence to the master prior to the grant of summary judgment.**<sup>6</sup>

On appeal, Burr argues that the master could not grant summary judgment because “the state of the factual record had not changed in any material way in this case since the court denied [Deutsche Bank’s] previous summary judgment motion.” {Initial Br. of App. p. 6}. This is categorically false. At the first hearing on the motion for partial summary judgment, the master denied the motion in order to allow the parties additional time for discovery on whether documents existed related to Burr’s claimed refinance. {Trans. dated September 22, 2016, p. 17, R. \_\_\_; Form 4 Order dated June 8, 2016, R. \_\_\_}. Deutsche Bank served written interrogatories, requests for production, and requests for admissions on Burr after the initial hearing. Burr failed to respond to the discovery. {Trans. dated September 22, 2016, p. \_\_\_, R. \_\_\_}. Burr’s failure to respond to the interrogatories and requests for production, coupled with the deemed admissions under Rule 36(a), SCRCF, constituted a different set of facts relevant to the master’s consideration of the motion for partial summary judgment.

Our Supreme Court has recognized that a party may renew a motion for summary judgment once new evidence has been gathered. Smith v. Breedlove, 377 S.C. 415, 421, 661 S.E.2d 67, 70-71 (2008); Dorrell v. S.C. Dept. of Transp., 361 S.C. 312, 325, 605 S.E.2d 12, 19 (2004). The completion of discovery qualifies as new evidence and a “different set of facts” to allow a ruling on the renewed motion.<sup>7</sup> Id. That is what occurred in this matter.

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<sup>6</sup> Again, this issue is not preserved for review as fully set forth in section I.a, supra.

<sup>7</sup> As noted in section I.b., supra, Rule 43(l), SCRCF, does not apply to this matter because the same master conducted the initial hearing on summary judgment and then entered the order granting the motion after the second hearing.

Deutsche Bank moved for partial summary judgment on Burr's counterclaims. The master conducted an initial hearing and denied the motion to allow time for the parties to conduct discovery on the factual allegations in the counterclaims. Deutsche Bank then, in accordance with the master's order, served written interrogatories, requests for production, and requests for admissions on Burr. Burr failed to accept the master's invitation to produce evidence to support his counterclaims and affirmative defenses in response to Deutsche Bank's discovery. In fact, Burr's failure to respond to the requests for admissions established that no material issues of fact existed as to his counterclaims. Thus, when Burr failed to respond, Deutsche Bank renewed the motion for summary judgment in front of the same master.

Burr's failure to respond to the written discovery requests and the deemed admissions equal a different set of facts to allow the master to rule. The master was therefore free to rule on the motion for partial summary judgment that included Burr's failure to respond to discovery and the deemed admissions. Burr's claim that his failure to respond to discovery does not constitute a "different set of facts" does not alter that result, and Burr does not cite any such authority to support his frivolous position. Thus, Burr's argument lacks any merit. Rule 43(l) cannot apply to bar the master's ruling.

Moreover, Burr's construction of Rule 43(l), SCRCF, would lead to absurd results by rewarding a party who fails to respond to discovery after an initial summary judgment hearing has occurred. The moving party would be barred from renewing the motion even when the non-moving party admitted, through failing to answer requests for admissions, that no genuine issue of fact existed in the matter. That cannot be the import of Rule 43(l), SCRCF. See, e.g., Schmidt, 339 S.C. at 368, 529 S.E.2d at 283 (recognizing the settled rule that courts will reject

an interpretation leading to an absurd result clearly unintended by language employed in the rule).

Therefore, the master correctly granted summary judgment after Burr failed to respond to written interrogatories, requests for production, and requests for admissions. This Court should reject Burr's unsupported argument and affirm the master's ruling.

**II. Because Burr failed to introduce any evidence sufficient to create a genuine issue of material fact as to the alleged refinance, the master properly granted summary judgment on Burr's counterclaims and affirmative defenses.**

As an initial matter, Burr fails to challenge each of the rulings of the master that supported the grant of summary judgment. The master found that Burr failed to introduce evidence sufficient to create a genuine issue of fact on his claims for Unfair Trade Practice and accounting or his affirmative defenses of unclean hands, estoppel, and novation. {Order Granting Partial Summary Judgment filed September 30, 2016, ¶30, R. \_\_\_\_}. The master also found the statute of limitations barred the Unfair Trade Practice claim. {Order Granting Partial Summary Judgment filed September 30, 2016, ¶32-33, R. \_\_\_\_}. The master also granted summary judgment on the basis of laches on the accounting claim. {Order Granting Partial Summary Judgment filed September 30, 2016, ¶33, R. \_\_\_\_}. Burr did not appeal each ruling. The only issue properly before this Court relates to the master's ruling that Burr failed to produce evidence to support his novation claim.

First, Burr only challenged the master's ruling on the Unfair Trade Practice claim on the basis that the master erred in applying the statute of limitations to that claim. {Initial Br. of App. p. 10-11}. Burr did not challenge the master's finding that summary judgment was proper on that claim because Burr failed to produce evidence on the Unfair Trade Practice claim. Thus,

our rules bar Burr from challenging that ruling on appeal. Under the two-issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420 n. 1, 472 S.E.2d 253, 255 n. 1 (1996) (holding that the two-issue rule “is applicable under other circumstances on appeal, including affirmance of orders of trial courts”); Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996); Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that an “unappealed ruling, right or wrong, is the law of the case” and precludes reversal when the party fails to challenge both findings by the trial court). As a result, this Court should affirm the master’s grant of summary judgment on the Unfair Trade Practice counterclaim.

Second, Burr likewise only appealed one of the two findings of the master as to why the accounting claim failed as a matter of law. Burr claims in his brief that the master erred in applying laches to that claim. {Initial Br. of App. p. 11}. Burr did not challenge the master’s finding that summary judgment was proper on that claim because Burr failed to produce evidence on the accounting claim. Therefore, this Court should affirm the master’s grant of summary judgment on the accounting counterclaim. See Dep’t of Highways, 322 S.C. at 420 n. 1, 472 S.E.2d at 255; Short, 323 S.C. at 525, 476 S.E.2d at 477; Atlantic Coast Builders, 398 S.C. at 329, 730 S.E.2d at 285.

Third, Burr failed to appeal the master’s finding that summary judgment was proper on that claim because Burr failed to produce evidence to support his unclean hands or estoppel defenses. As a result, those rulings are not before this Court. See ML-Lee Acquisition Fund,

L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (holding that an unappealed ruling is law of the case).

In sum, the sole issue before the Court on appeal relates to the master's ruling that Burr failed to produce evidence to support his novation claim. That claim lacks merit. In his brief, Burr claims that a genuine issue of material fact exists as to whether the parties entered into a novation for the 2008 refinance. {Initial Br. of App. p. 8 (arguing the evidence "shows that the parties entered into an agreement to refinance the subject debt . . . . This agreement to refinance was a novation.")}. This argument is frivolous.

Burr admitted to the master that his claim lacked any evidentiary support. Burr acknowledged on the record that he had no documentation to show that he applied for a refinance or to prove the terms of the refinance loan that he claimed he entered into in 2008. {Trans. dated September 22, 2016, p. 10, 21-22\_, R. \_\_\_\_}. Moreover, Burr's counsel admitted that Burr's responses to Deutsche Bank's discovery requests<sup>8</sup> did not create an issue of material fact. Burr also admitted, by failing to answer the requests for admissions, that he did not sign a promissory note, did not sign any mortgage, or make any payments on the alleged refinance loan that formed the sole factual basis for his counterclaims and affirmative defenses.

Based on the above, Burr cannot claim to this Court that a genuine issue of material fact exists on the novation claim. Burr admitted otherwise to the master. See, e.g., Kinard v. Crosby, 315 S.C. 237, 433 S.E.2d 835 (1993) (holding that appellant cannot argue issues on appeal that were conceded below); State v. Bowman, 338 S.C. 151, 526 S.E.2d 228 (2000)

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<sup>8</sup> Burr's discovery responses included the affidavit that he claims in his brief to this Court was sufficient to create an issue of fact.

(holding an issue conceded to the trial court cannot be raised to an appellate court on appeal). This Court should reject this frivolous position and affirm the grant of summary judgment.

Burr's reliance on his affidavit does not alter his admission to the master that his discovery responses, which included this affidavit, did not create an issue of material fact. The affidavit, at best, stated that Burr had an agreement to enter a refinance of the loan at some point in the future but it was not consummated. {Affidavit of Burr filed March 15, 2016, ¶5, 6, R. \_\_\_\_}. Such an agreement to agree would not create an enforceable contract.

Agreements to agree cannot establish an enforceable contract because such agreements leave open the essential and material terms necessary for contract creation. See, e.g., N. Am. Rescue Prods., Inc. v. Richardson, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015); Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 579, 762 S.E.2d 696, 701 (2014); Ellis v. Taylor, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994). Therefore, an agreement to agree as stated in the affidavit cannot create a genuine issue of material fact in this matter as to whether a novation occurred. This Court should affirm the grant of summary judgment.

### Conclusion

Based on the foregoing, each of Burr's argument lack merit. This Court should affirm the master's grant of summary judgment to Deutsche Bank.

{Signature Page Follows}

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October 16, 2017

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM Horry County  
Master-in-Equity

The Honorable Cynthia Graham Howe

Appellate Case No. 2017-000884  
Civil Action No. 2012-CP-26-04695

RECEIVED  
OCT 16 2017  
SC Court of Appeals

Deutsche Bank National Trust Company, as Trustee on  
Behalf of the Certificateholders of Morgan Stanley ABS  
Capital I Inc. Trust 2004-NC8 for Mortgage Pass  
Through Certificates, Series 2004-NC8, .....

Respondent,

v.

James T. Burr a/k/a James Burr and Grand Strand  
Water & Sewer Authority, .....

Defendants

Of whom James T. Burr a/k/a James Burr is the  
Appellant, .....

Appellant.

**PROOF OF SERVICE**

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins  
Riley & Scarborough LLP, attorneys for Deutsche Bank National Trust Company, do hereby  
certify that I have served all counsel in this action with copies of the pleading(s) hereinbelow  
specified to the following address(es):

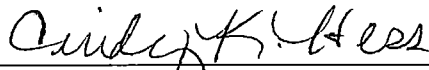
Pleadings: **Initial Brief of Respondent**

**Respondent's Designation of Matters**

Counsel Served:

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Sr. Administrative Assistant

October 16, 2017



**NELSON MULLINS**

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October 16, 2017

**Hand Delivered**

The Honorable Jenny Abbott Kitchings  
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South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

**RECEIVED**

OCT 16 2017

**SC Court of Appeals**

RE: Deutsche Bank National Trust Company v. James T. Burr a/k/a James Burr and  
Grand Strand Water & Sewer Authority  
Appellate Case No. 2017-000884  
Our File No. 33812/01626

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter please find the original and one copy of the Initial Brief of Respondent and Designation of Matters. Please return a clocked-in copy of each to us via our courier.

By copy of this letter to counsel, I am hereby serving him with a copies of these documents.

Very truly yours,

Michael J. Anzelmo

MJA:ckh  
Enclosures  
cc: Andrew S. Radeker, Esquire