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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2009-CP-07-04301

Daniel L. Junk and Christine H. Junk, — Appellants,

v.

Mortgage Electronic Registration Systems, Inc., and John Does 1-5,000, — Respondents.

Case No. 2009-CP-07-05088

CitiMortgage, Inc., — Respondent,

v.

Daniel Junk a/k/a Daniel L. Junk and Christine H. Junk and Oldfield Community Association, — Defendants,

Of Whom Daniel L. Junk and Christine H. Junk are, — Appellants,

-and-

Daniel L. Junk and Christine H. Junk, — Counterclaim Appellants,

v.

CitiMortgage, Inc. — Counterclaim Respondent.

-and-

Daniel L. Junk and Christine H. Junk, — Third-party Appellants,

v.

Riley Pope & Laney, LLC , Heidi Carey, Esq., Roy Laney, Esq., T. Lowndes Pope, Esq., Bayview Loan Servicing, LLC, MERSCORP, Inc., Mortgage Electronic Registration Systems, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., John Does 1-5,000, Jennifer Oakes, Robert G. Hall, Security Connections, Inc., Krystal Hall, Danielle Sterling, ABC Appraisal Group, Inc., Mark A. Ruplinger, Linda Heller, Harry Jones, Colonial Coast Title Agency, Inc., Lawyers Title Insurance Corporation, Corelogic, Inc. and American Home Mortgage Holdings, Inc.

Third-party Respondents.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER IN EQUITY ERR IN DIRECTING AND PERMITTING VIA EMAIL, OPPOSING COUNSEL FOR SOME OF THE LITIGANTS TO "COLLABORATE" AND DRAFT THE FEBRUARY 22, 2012, ORDER IN VIOLATION OF CANON 3 OF THE SOUTH CAROLINA CODE OF JUDICIAL CONDUCT WHICH REQUIRES A JUDGE TO DECIDE MATTERS ASSIGNED TO HIM (CANON 3 (B)(1)) AND PERMITS THE JUDGE TO OBTAIN THE ADVICE OF ONLY A DISINTERESTED EXPERT ON THE LAW APPLICABLE TO A PROCEEDING BEFORE THE JUDGE, (CANON 3 (B)(7)(B))?

2. DID THE MASTER IN EQUITY ERR IN GRANTING MS. CAREY'S, MR. LANEY'S, MR. POPE'S AND RLP'S MOTION TO DISMISS THE THIRD PARTY COMPLAINT UNDER RULE 12(b)(6), SCRCP, BY SUBSTITUTING THE MASTER'S JUDGMENT FOR THAT OF A JURY ON THE ISSUE OF PROFESSIONAL NEGLIGENCE BECAUSE THE PLAINTIFF DEMANDED A JURY TRIAL AND OFFERED THE AFFIDAVIT OF EXPERT THOMAS A. PENDARVIS, ESQ. AS EVIDENCE OF PROFESSIONAL NEGLIGENCE?

3. DID THE MASTER IN EQUITY ERR UNDER SC CODE ANN. §§ 36-3-308 AND 36-3-203(c) IN DISMISSING THE QUIET TITLE CLAIM A SECOND TIME BECAUSE APPELLANTS' PRESENTED THE AFFIDAVIT OF DANIELLE STERLING, SETTING FORTH SPECIFIC FACTS, SHIFTING THE BURDEN UNDER THE LAW ONTO CITIMORTGAGE TO PROVE HOLDER STATUS, AND SHOWING THAT THERE IS A GENUINE ISSUE OF FACT UNDER THE LAW FOR TRIAL IN THE QUIET TITLE ACTION?

4. DID THE MASTER IN EQUITY ERR IN DISMISSING APPELLANTS' THIRD PARTY COMPLAINT SUA SPONTE CHANGING THEIR PLEADINGS TO MALICIOUS PROSECUTION WHEN THEY PLED CIVIL CONSPIRACY AND SOUTH CAROLINA RECOGNIZES CIVIL CONSPIRACY FOR LAWFUL ACTS?

5. DID THE MASTER IN EQUITY ERR IN DISMISSING APPELLANTS' THIRD PARTY COMPLAINT FOR FAILURE TO PLEAD DERIVATIVE LIABILITY AS A MATTER OF LAW UNDER RULE 12(b)(6), SCRCP, WHEN THE FORECLOSURE COMPLAINT CONTAINS NO COUNT TO ENFORCE THE DEBT EVIDENCED BY THE NOTE AND BECAUSE CITIMORTGAGE *EXPRESSLY WAIVES* BOTH A *PERSONAL JUDGMENT* AND A *DEFICIENCY JUDGMENT* AGAINST THE APPELLANTS UNDER SC CODE ANN. §§29-3-650 AND 29-3-660 ON THE DEBT PURPORTEDLY EVIDENCED BY THE REFINANCE NOTE?

6. DID THE MASTER IN EQUITY ERR IN GRANTING CITIMORTGAGE'S MOTION TO DISMISS APPELLANTS' COUNTERCLAIMS UNDER RULE 12(b)(6), SCRCP, BY SUBSTITUTING THE MASTER'S JUDGMENT FOR THAT OF A JURY ON THE ISSUE OF WHEN APPELLANTS COULD HAVE KNOW THEY HAD CLAIMS

AGAINST CITIMORTGAGE, BECAUSE THE PLAINTIFF DEMANDED A JURY TRIAL AND OFFERED THE AFFIDAVIT OF DANIELLE STERLING, SETTING FORTH SPECIFIC FACTS, SHIFTING THE BURDEN UNDER THE LAW ONTO CITIMORTGAGE TO PROVE HOLDER STATUS, AND SHOWING THAT THERE IS A GENUINE ISSUE OF FACT UNDER THE LAW FOR TRIAL REGARDING APPELLANTS' COUNTERCLAIMS IN THE FORECLOSURE ACTION?

7. DID THE MASTER IN EQUITY ABUSE HIS DISCRETION IN CONCLUDING ATTORNEY NEGLIGENCE CONSTITUTES "GOOD "CAUSE" IN GRANTING THIRD PARTY RESPONDENT COLONIAL COAST TITLE AGENCY RELIEF FROM ENTRY OF DEFAULT?

8. DID THE MASTER IN EQUITY ABUSE HIS DISCRETION IN DENYING APPELLANTS'MOTION FOR DEFAULT JUDGMENT AGAINST AMERICAN HOME MORTGAGE HOLDINGS, INC. AS MOOT, BECAUSE JUDGMENT, IF RENDERED *WOULD* HAVE A PRACTICAL LEGAL EFFECT UPON THE EXISTING CONTROVERSY?

STATEMENT OF THE CASE

On its face, this matter appears to be a procedural morass; however, when looked at carefully, it's an injustice to Appellants and the rule of law. This matter began as an action in equity to quiet title to property. Lis pendens is a core doctrine of real property law in South Carolina. The purpose of the lis pendens doctrine is to prevent justice of the court being evaded. Its object is to prevent that interminable round of litigation which must ensue if property might be shuffled from hand to hand to elude the process of the law.[1] Therefore, where a person purchases an estate during the pendency of an action to try the title, or where a bill is filed to obtain an estate which is charged with the payment of debts, the estate will be subject to those prior claims.[2]

I. This Matter Began as an Equitable Action for Quiet Title

This matter began as an action in equity for quiet title of Appellants' property located at 181 Oldfield Way, Okatie, SC 29909 (the "Oldfield Property"). Appellants filed their original quiet title action on September 11, 2009 ("Original Quiet Title Action"), against the only recorded interests on their property – American Home Mortgage ("AHM"), Respondent Mortgage Electronic Registration Systems, Inc. as nominee mortgagee for AHM and its successors and assigns ("MERS"), and unrecorded, unknown parties John Does 1-5,000 (collectively the "Original Quiet Title Parties"). [cite].

Appellants timely and properly served the Original Quiet Title Parties. [cite]. AHM timely appeared by filing a Suggestion of Bankruptcy stating that it was under the protection of

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[1] 54 C.J.S. *Lis Pendens* § 10 (2012); see also, *Watlington v. Howley*, 1 Des. 167, 1787 WL 78, FN1a (S.C. Ch. 1787) citing *Sorrell vs. Carpenter*, 2 P. Wms. p. 482, 483.

[2] *Edmonds v. Crenshaw*, 1 McCord Eq. 252, 1826 WL 747 (S.C. App. 1826) citing *Walker v. Smallwood*, Amb. 676, *Sorrell v. Carpenter*, 2 P. Wms. 482.

the United States Trustee for the United States Bankruptcy Court for the District of Delaware pursuant to its filing for bankruptcy almost two years prior, August 6, 2007. [cite]. Appellants non-suited AHM without prejudice pursuant to its filing of the Suggestion of Bankruptcy. [cite].

Respondent MERS, the parties' designated agent for service of process in proceedings involving a property for which MERS holds the purported mortgage for its member banks,[3] timely filed its Answer to the Original Quiet Title Action on October 19, 2009. [cite]. John Does 1-5,000, did not appear and an Entry of Default was issued by the Beaufort County Clerk on [date]. [cite].

MERS' Answer to the Original Quiet title Action demanded it be dismissed for lack of interest in the Oldfield Property. MERS' dismissal demand was based on the alleged fact that it assigned its interest in the refinance note and purported mortgage on the Oldfield Property, if any, *as nominee of bankrupt AHM*, to its member Respondent Bayview Loan Servicing, LLC ("Bayview"), on September 25, 2009. [cite]. MERS dismissal demand admits that the purported assignment of its interests, if any, in the MERS Mortgage and the Oldfield Property, occurred during the pendency of the Original Quiet Title Action – *eight days after* MERS accepted service for its principal member bank that purportedly had an interest in the Oldfield Property. [cite].

MERS did not plead the affirmative defense in its Answer that its purported principal and assignee Bayview, was a necessary party to the Original Quiet Title Action. After filing its Answer, and purportedly executing an assignment of the refinance note, MERS Mortgage and interest, if any, in the Oldfield Property to Bayview, MERS filed a subsequent Rule 12(b)(6), SCRCP, or in the Alternative Summary Judgment, motion to dismiss the Original Foreclosure

[3] Respondent CitiMortgage, Inc. established MERS as the parties' designated agent for service of process for matters involving a property for which MERS holds the purported mortgage for its member banks as a matter of law before Indiana's highest court, the Indiana Supreme Court, in the matter of *Citimortgage, Inc. v. Shannon Barabas*; yet, Respondents Bayview and CitiMortgage argue precisely the opposite before the lower court in the Original Quiet Title Action. [cite].

Action on November 23, 2009 ("MERS Motion"). [cite]. In response, Appellants' filed a motion for judgment on the pleadings under Rule 12(c), SCRCP, and for default judgment against John Does 1-5,000, and a motion requiring MERS to post an indemnity bond for a lost instrument.

The MERS Motion and Appellants' motions were heard before the Master in Equity over two separate hearings: the first on December 6, 2010 [cite], and the second on February 10, 2011[cite], with an order on the motions issued by the lower court on April 11, 2011 ("April 11 Order"). The April 11 Order dismissed the Original Quiet Title Action without prejudice, denying both Appellants' Rule 12(c), SCRCP, motion for judgment on the pleadings and default judgment, and their motion for MERS to post a bond for a lost instrument.

The April 11 Order was without leave to amend, and specifically directed the Appellants to bring their claims for quiet title of the Oldfield Property, along with any other claims they may have, in their answer to the separate and subsequently filed action for foreclosure filed by Bayview (the "Foreclosure Action"). [cite]. The April 11 Order is a part of this consolidated appeal presently before the Court because the other Orders in this consolidated appeal made the April 11 Order a final appealable order. [cite].

This Court dismissed Appellants' first appeal of the April 11 Order on the grounds that the Order was not a final Order. [cite]. Despite the fact that the Order from this Court dismissing Appellants' first appeal of the April 11 Order stated the Original Quiet Title was not a final decision, and the fact the case is currently pending Petition for a Writ of Certiorari before the South Carolina Supreme Court, Case Tracking No. 2012-205650, the lower court refused to stay the separate foreclosure action based on Respondent Bayview and CitiMortgage Inc.'s claims of

ownership interest in the Oldfield Property allegedly received during the pendency of the Original Quiet Title Action.

II. Bayview Filed a Separate and Subsequent Foreclosure Action on the MERS Mortgage Only, Despite Acquiring its Interest, if any, in the MERS Mortgage During the Pendency of the Original Quiet Title Action

The April 11 Order also decided Appellants' Rule 12(b)(6), Rule 12(b)(8) and Rule 13(a), SCRCP, motions in the Foreclosure Action without ever consolidating the Original Quiet title Action and the Foreclosure Action. Despite being timely served through MERS as its agent for service of process, and receiving a purported assignment of the note and purported mortgage from MERS as nominee for bankrupt AHM during the pendency of the Original Quiet Title Action, Bayview never made an appearance in the Original Quiet Title Action to assert its rights, if any, in the MERS Mortgage or the Oldfield Property.

Instead of properly asserting its purported interest in the MERS Mortgage and the Oldfield Property as a compulsory counterclaim in the Original Quiet Title Action, Bayview chose to file a separate action for foreclosure of the mortgage only – not an action to enforce the promissory note purportedly secured by the MERS mortgage. The Bayview Complaint does not plead any count for enforcement of the promissory note debt. In fact, the Bayview Complaint *expressly waives* both a *personal judgment* and a *deficiency judgment* against the Junks on the debt purportedly evidenced by the refinance note under SC Code Ann. §§29-3-650 and 29-3-660. [cite].

On October 19, 2009 – thirty-two (32) days after being served with the Original Quiet Title Action and the same day MERS filed its Answer in the Original Quiet Title Action – Bayview recorded its September 25, 2009, purported assignment of the MERS mortgage on the Oldfield Property. Shortly thereafter, on October 27, 2009, – forty (40) days after being served

the Original Quiet Title Action – Bayview filed the Foreclosure Action as the "owner and holder of the Note and Mortgage" described within the Foreclosure Action Complaint [cite]. Yet the copy of the Note incorporated into the mortgage foreclosure pleading is made out to AHM and contains a purported indorsement from AHM to CitiMortgage.

Appellants argued to the court below that the note offered in the pleadings as proof of the debt and authority to foreclose the mortgage is unenforceable by Bayview as a matter of law under SC Code Ann. §§ 36-3-201 and 36-3-301. [cite]. Exhibits incorporated into a pleading control the facts of the pleading. Bayview lacked standing to invoke the jurisdiction of the court based on its pleadings.

Bayview's counsel, Respondents Heidi Carey, Esq. ("Carey"), Roy Laney, Esq. ("Laney"), T. Lowndes Pope, Esq. ("Pope") and the law firm of Riley Pope & Laney, LLC ("RPL") verified the Foreclosure Action Complaint on sworn personal knowledge by affidavit, claiming Bayview was the owner and holder of the debt secured by the MERS Mortgage, and owner of the MERS Mortgage. The refinance note attached and incorporated into the pleading controlled the fact that Bayview, on the face of its pleadings, as a matter of law, was unable to enforce the debt represented by the very note it purported to own, and therefore unable to enforce the purported MERS Mortgage against the Oldfield Property. The refinance note was not made out to Bayview nor was it indorsed to Bayview.

III. Bayview and CitiMortgage Claims of Interest in the Oldfield Property are Subject to the Final Outcome of the Original Quiet Title Action Currently Pending Petition for Writ of Certiorari in the South Carolina Supreme Court

Bayview and Respondent CitiMortgage, Inc. ("CitiMortgage") allegedly each acquired its interest in the MERS Mortgage and the Oldfield Property by way of alleged assignment of the purported mortgage and debt during the pendency of the Original Quiet Title Action. [cite].

Under the equitable doctrine of lis pendens, each Respondent takes its purported interest in the MERS Mortgage and Oldfield Property, if any, subject to the final outcome of the Original Quiet Title Action as if it were a party to that action – which neither was despite proper service of process on MERS, the parties' designated agent for service of process.

Until the South Carolina Supreme Court decides the pending Petition for Writ of Certiorari of the April 11 Order covering both the Original Quiet Title Action and the Foreclosure Action, the Original Quiet Title Action is not final. Neither Bayview nor CitiMortgage possess the requisite standing to invoke the subject matter jurisdiction of the South Carolina courts to maintain an action for foreclosure of the mortgage against the Oldfield Property. Because MERS aliened the MERS Mortgage and Oldfield Property during the pendency of the Original Quiet Title Action, the pending judgment of the South Carolina Supreme Court in the Original Quiet Title Action shall overreach such alienation, and Respondents lack standing to invoke the subject matter jurisdiction of the courts until the Original Quiet Title Action is finally decided.

IV. Substitution of Counsel and Parties

On March 15, 2010, the lower court entered a consent order substituting current law firm Nelson Mullins Riley & Scarborough ("Nelson Mullins") and past counsel Elizabeth Scott Moïse, Esq. ("Moise"), James Farrier, Esq. ("Farrier"), and Jennifer Thiem, Esq. ("Thiem") as counsel for MERS. Initially, both MERS and Bayview were represented by Carey, Laney, Pope, and RPL. Carey, Laney, Pope, and RPL filed a motion to withdraw from both actions on May 13, 2010 along with a joint motion to substitute Plaintiff Party CitiMortgage for Bayview. [cite].

While acting as counsel for MERS and Bayview, Ms. Carey, Mr. Laney and RPL caused the following to be either filed or recorded[4]:

- two separate fraudulent Lis Pendens in this case. [cites];
- two separate fraudulent assignments in this case [cite];
- one false affidavit in her own name [cite];
- one perjured affidavit of Jennifer Oakes that she filed in support of her Motion for Substitution of Plaintiff and for Substitution of Counsel for Substitute Plaintiff dated March 30, 2010. [cite].

Sometime between May 2010 and December 2010, Nelson Mullins substituted counsel one more time internally, and Ms. Moïse withdrew and Mr. Brian Crotty took over as current counsel to Bayview and CitiMortgage and various other Third Party Respondents in this appeal.

V. The April 11, 2011 Order

In the Original Quiet Title Action, the April 11 Order ignored the 12(b)(6) standard for review in granting MERS motion to dismiss. It did not accept the facts as plead in the Original Quiet Title Action Complaint as true. Moreover, it ignored the case law attached and incorporated into the Original Quiet Title Action pleading as an Exhibit. Appellants pled that as a result *of Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking and Finance*, 270 Neb. 529, 704 N.W.2d 784, MERS is judicially estopped from claiming any pecuniary interest in Appellants' debt to assign since MERS established before the Nebraska Supreme Court that it is precluded by its membership rules to ever hold a pecuniary interest or possess unauthorized authority to enforce the debt as the nominee mortgagee for its members. MERS argued and the court held because MERS by design could not have a pecuniary interest in

[4] The Affidavit of Jennifer Oakes was part of a joint motion filed by past counsel Ms. Heidi Carey and past counsel Ms. Elizabeth Scott Moïse of Nelson Mullins & Riley.

the debt secured by its mortgages as nominee for its members, MERS was not subject to the state's regulatory taxes.

Appellants argued MERS is judicially estopped from assigning its nominee interest to another member without permission from its principal. In this case, AHM, as MERS' recorded principal, was bankrupt and any agency relationship MERS may have had with AHM had been terminated as a matter of law on August 6, 2007. Furthermore, the April 11Order ignored MERS' Answer stating it had no interest in the property and that it assigned its interest, if any, during the pendency of the Original Quiet Title Action to Bayview – which chose not to appear in the action. [cite].

Appellants' Rule 12(b)(6), SCRCP, motion was denied based on the lower court's use of Rule 17(a), SCRCP, to impermissibly attempt to cure the original jurisdictional defects of the pleadings in the Foreclosure Action. [cite]. The April 11 Order substituted CitiMortgage as Plaintiff for Bayview and ignored the fact that the motion for substitution was made under Rule 25, SRCP, supported by Third Party Respondent Jennifer Oakes' ("Oakes") affidavit, stating under oath and the penalty of perjury, that Bayview *sold and endorsed* the refinance note and MERS Mortgage to CitiMortgage in March of 2010 despite the fact that the endorsement in question already appeared on the refinance note when it was filed in the court below almost five (5) months prior.

Additionally, the lower court held that Bayview had not been properly served in the Original Quiet Title Action despite the fact that the purported MERS Mortgage subject both actions in the April 11 Order, appoints MERS as the agent for service of process for the assigns of AHM that are members of MERS. The April 11 Order held that Bayview was a necessary

party to the Original Quiet Title Action and incorrectly found as a matter of law that service upon Bayview through its appointed agent MERS, was defective.

The April 11 Order dismissed the Original Quiet Title Action without prejudice yet did not grant Appellants' request for leave to amend. [cite]. Rather, the April 11 Order was an abuse of discretion that prejudiced Appellants. The lower court directed Appellants' to refile their quiet title claims as affirmative defenses and counterclaims, or third party claims, in their answer to the Foreclosure Action Complaint.[cite]. The lower court impermissibly dismissed the Original Quiet Title Action "without prejudice" yet directed Appellants' to change their pleading status from Plaintiff to Defendant. Overlooking the fact that, under the doctrine of lis pendens, Bayview and CitiMortgage take their interests, if any, subject to the final outcome if the Original Quiet Title Action.

VI. Appellants' Answer, Counterclaims and Third Party Complaint in the Foreclosure Action

As directed by the April 11 Order, despite the fact that the Original Quiet Title Action was still pending appeal, Appellants filed their Amended Answer, Counterclaims and Third Party Complaint ("Foreclosure Answer") with a Jury Demand for all matters at law on June 16, 2011. Per the April 11 Order, Appellants' asserted numerous affirmative defenses and counterclaims against CitiMortgage and joined all Third Party Respondents herein on third party claims for civil conspiracy and slander of title, with an additional count of professional negligence against Carey, Laney, Pope, and RPL supported by the Affidavit of Thomas Pendarvis, Esq. [cite]. Appellants additionally restated their previous count from the Original Quiet Title Action for quiet title against all the Third Party Defendants and CitiMortgage.

Appellants' Foreclosure Answer specifically denies that Appellants' MERS Mortgage is a valid enforceable mortgage under South Carolina law. Appellants' also specifically denied:

being in default; the debt being owed to CitiMortgage; and the signatures on the documents purporting to be genuine and valid under SC Code Ann. § 36-3-308. [cite].

Various third parties defaulted, and Entry of Default was filed and entered against each of them. All but two of the Third Party Respondents moved either separately or jointly to dismiss the Third Party Complaint under Rule 12(b)(6), SCRCP, or to sever the claims and or relief from entry of default. One Third Party, American Home Mortgage Holdings. Inc. remained in default and never sought relief from the court below for relief from entry of default. The remaining Third Party in default, Danielle Sterling, remained in default but settled with Appellants rather than have default judgment taken against her.

Ms. Sterling was implicated in the foreclosure Action by the December 6, 2010, sham *supplemental* affidavit of Ms. Oakes and CitiMortgage, sworn to again under personal knowledge and the penalty of perjury, in further support of CitiMortgage's motion to substitute Plaintiff in the Foreclosure Action under Rule 25, SCRCP. In her sham supplemental affidavit, Ms. Oakes stated and swore that she was mistaken in her first sworn affidavit, and that AHM sold Appellants' debt directly to CitiMortgage at an unknown date in 2007 as opposed to her prior testimony that Bayview sold the debt to CitiMortgage in March of 2010, and further, that Third Party Danielle Sterling endorsed the refinance promissory note from AHM to CitiMortgage. [cite].

Prior to the January 17, 2012, second hearing on the Third Party Motions and Appellants' Motion for Joinder, Ms. Sterling gave Appellants an affidavit stating that she did not endorse the note from AHM to CitiMortgage and that the refinance note did not contain her signature ("the "Sterling Affidavit"). [cite]. At the January motion hearing, Appellants set forth specific facts showing that there is a genuine issue for trial before a jury on matter of law as to whether

CitiMortgage had the authority to enforce the debt evidenced by the refinance note at the time Bayview filed the Foreclosure Complaint. Appellants did not rest upon the mere allegations or denials of their pleadings and properly met their burden under SC Code Ann. § 36-3-308. [cite]. The lower court asked Appellants if the Sterling Affidavit made the refinance note a bearer note if the indorsement is invalid. [cite]. The lower court went so far as to question Appellants as if they had a burden to admit the refinance note as proper evidence of the debt, when the law under the UCC clearly shifts the burden onto CitiMortgage to prove the debt in light of the Sterling Affidavit. [cite].

VII. The February 22, 2012, Third Party Complaint Dismissal Order

The Master in Equity heard Third Party Defendants' motions to dismiss Appellants' Third Party Complaint and Third Party motions for relief from entry of default over two separate hearings on September 14, 2011, and January 17, 2012. [cite]. At the September 14 hearing, the Master in Equity stated he had not yet read the Appellants' Foreclosure Answer despite the fact he was hearing arguments to dismiss the Third Party Complaint. [cite]. The Master in Equity invited briefs from the parties on third party practice as it relates to the joinder of parties and the motions to dismiss pending before the lower court at that time. [cite].

On September 23, 2011, in response to the court's September 14 invitation to brief the third party issue, Appellants filed their Motion and Memorandum Under Rule 14(c), SRCP, to Join all Third-Party Defendants as Counterclaim Defendants Under Rule 13(h), SCRCP, and Necessary Parties Under Rule 19, SCRCP (the "Joinder Motion"). [cite]. On January 17, 2012, the court below heard Appellants' Joinder Motion, the remaining motions to dismiss the third Party Complaint and the motions for relief from default.

The very next day, January 18, 2012, the court below granted all Third Party Motions to Dismiss and for relief from entry of default, and denied Appellants Motion for Joinder, *via email*. [cite]. The court's email told the Third Party Defendants to "collaborate on an Order . . . for the reasons articulated in arguments and briefs." [cite]. Appellants filed their objection on the record on February 15, 2012, for asking opposing counsel as opposed to a disinterested expert, to write the court's decision and order. [cite].

The court below signed the Order Dismissing the Third Party Complaint, Denying Appellants' Motion to Join Third-Party Defendants as Counterclaim Defendants and Granting Motions for Relief from Default, on February 22, 2012. The February 22 Order dismisses Appellants' Third Party Complaint and denies their Motion for Joinder, citing no derivative liability for paying the debt evidenced by the refinance note. However, the Foreclosure Action does not seek judgment against Appellants on the debt, and *expressly waives* both a *personal judgment* and a *deficiency judgment* against the Junks on the debt purportedly evidenced by the refinance note under SC Code Ann. §§29-3-650 and 29-3-660. [cite]. On March 24, 2012, Appellants filed their Notice of Appeal to the February 22 Order and the April 11, 2011, Order since that is now a final order, and those Orders are two of the consolidated Orders subject this appeal. [cite].

a. The Order for Relief from Default in Favor of Third Party Respondent Colonial Coast Title Agency

Appellants opposed Third Party Respondent Colonial Coast Title Agency's ("Colonial Coast") Motion for Relief from Default. Appellants filed their brief in opposition to the motion on January 17, 2012. [cite]. Attorney negligence is Colonial Coast's only reason given for "good cause" relief in its pleading. Attorney negligence has widely been held in South Carolina *not* to be good cause. Over both written and oral objection, the court based its decision on

whether Appellants could show prejudice as opposed to requiring Colonial Coast show good cause under the law.

VIII. The April 24, 2012, Order Dismissing Counterclaims against CitiMortgage and the May 2, 2012, Order Denying Default Judgment Against American Home Mortgage Holdings, Inc. as moot.

The court below held a motion hearing on February 23, 2012, to decide CitiMortgage's Motion to Dismiss the Counterclaims along with Appellants' Motion for Default Judgment against Third Party Respondent American Home Mortgage Holdings, Inc. ("AHMHI"). The court dismissed Appellants' Motion for Default Judgment against AHMHI as being moot in light of the court's decision entered the day prior holding Appellants' Third Party Complaint was improper and therefore dismissed. [cite]. That Order is dated May 20, 2012 and Notice of Appeal was filed on May 22, 2012

At the February 23, 2012, motion hearing, the court heard argument by both sides on CitiMortgage's Motion to Dismiss the Junks' Counterclaims. The court also asked both sides to submit briefs on the statute of limitations issues, among others, raised by CitiMortgage in its Motion to Dismiss. [cite]. The Master in Equity again allowed opposing counsel to write the decision and order of the court. Despite Appellants filing their jury demand on all matters at law with the court, the April 24 Order ignores the Rule 12(b)(6), SCRCP, standard of review and made findings of fact and rulings of law without a jury over Appellants' objections on the record. [cite]. That Order is dated April 24, 2012 and Notice of Appeal was filed on May 3, 2012.

IX. Appellate Motion to Dismiss or Stay in the Alternative

On April 17, 2012, pursuant to Rule 240(a), SCACR, Appellants filed in this Court a Motion to Dismiss or Stay in the Alternative the Foreclosure Action Pending Appeal of the Quiet Title Action. [cite]. The Court denied the Motion on June 7, 2012, and Appellants filed a

Petition for Rehearing on June 22, 2012. [cite]. Nelson Mullins filed a Motion for Sanctions against Appellants' counsel with its Return to the Motion. On September 11, 2012, this Court declined to rehear the Motion citing Rule 240(i), SCACR, – finding the decision did not have the effect of dismissing or finally deciding Appellants' appeal. The Court also denied Nelson Mullins" Motion for Sanctions against Appellants' counsel on September 11, 2012. [cite].

X. On June 7, This Court asked the Parties to Brief the Appealability of the May 20, 2012, Order for Mootness

This Court requested the parties to submit briefs on whether the May 20, 2012, Order, denying Appellants' Motion for Default Judgment against AHMHI, was appealable as a result of the lower court's dismissal deeming the motion moot. Appellants and Respondents filed their respective briefs with the Court on or about June 16, 2012. No ruling has been issued on either party's submitted briefs addressing the appealability of the May 20, 2012, Order. Appellants' hereby incorporate by reference, the arguments and case law contained in their June 16, 2012, Memorandum in Support of their Notice of Appeal of the May 2, 2012 Order – Tracking No. 2012-212148. [cite].

XI. November 8, 2012 Letter Setting Briefing Schedule

This Court in a letter dated November 8, 2012, directed Appellants' to procure the February 23, 2012, transcript within 15 days, consolidated appeals 2012-210910, 2012-212115, and 2012-212148, and to file their initial brief and Designation of the Record by December 21, 2012. [cite]. The Court's November 8, 2012, Letter states that neither party is prevented from arguing the appealability of any of the consolidated Orders.

ARGUMENTS

I. BECAUSE CANON 3 OF THE SOUTH CAROLINA CODE OF JUDICIAL CONDUCT, RULE 3, CJC, RULE 501, SCACR, REQUIRES A JUDGE TO DECIDE MATTERS ASSIGNED TO HIM (CANON 3 (B)(1)) AND PERMITS THE JUDGE TO OBTAIN THE ADVICE OF ONLY A DISINTERESTED EXPERT ON THE LAW APPLICABLE TO A PROCEEDING BEFORE THE JUDGE, (CANON 3 (B)(7)(B)), THE TRIAL COURT ERRED IN DIRECTING AND PERMITTING COUNSEL FOR SOME OF THE LITIGANTS TO DRAFT ITS DECISIONS.

"A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute." *See Commentary*, 3, CJC, Rule 501, SCACR. In the instant appeal, the Honorable Marvin Dukes, III, Master in Equity, Beaufort County, has demonstrated manifest bias on the record, impairing the fairness of the proceeding, by his actions on January 8, 2012, in directing opposing counsel via email, to "collaborate on an Order . . . for the reasons articulated in arguments and briefs[]" submitted to and argued before the court the day before at the January 17, 2012, hearing. [cite].

The Master in Equity erred in seeking to obtain the advice of *interested* experts – opposing counsel – when deciding the matters assigned to him under Rule 3, CJC, Rule 501, SCACR. Canon 3(B)(1) requires the Master in Equity to decide the matters assigned to him impartially and fairly. Canon 3(B)(7)(B) clearly states that a judge may obtain the advice *only* of a *disinterested* expert on the law proceeding before him and his court.

The fact that the Master in Equity directed opposing counsel – clearly with an interest in writing the decision for the court – to write the court's February 22, 2012, 16 page, reasoned legal decision, dismissing Appellants' Third Party Complaint as improper against all parties, granting relief from entry of default to Third Party Respondents and dismissing Appellants' Motion for Joinder of Third Parties as Counterclaim Defendants. *Id.* In dismissing Appellants'

counterclaims against CitiMortgage, the court again asked opposing counsel to write the court's decision, resulting in the April 24, 2012, 13 page, reasoned legal decision written by counsel for CitiMortgage, Mr. Brian Crotty. The manifest bias and violation of Rule 3, CJC, Rule 501, SCACR by the Master in Equity in directing and allowing opposing counsel, clearly an interested party and in violation of the rules, prejudices Appellants and the February 22,2012 Order and the April 24, 2012 Order constitute reversible error and should be reversed and remanded with instructions.

II. BECAUSE THE CONSOLIDATED FEBRUARY 22, 2012 AND APRIL 24, 2012 ORDERS WERE NOT DECIDED UNDER EITHER RULE 12(b)(6), OR 12(f) SCRCP STANDARD, AND BECAUSE APPELLANTS FILED A JURY DEMAND FOR ALL MATTERS AT LAW WITH THEIR ANSWER, COUNTERCLAIM AND THIRD-PARTY COMPLAINT, THE MASTER IN EQUITY COMMITTED REVERSIBLE ERROR IN SUBSTITUTING HIS JUDGMENT FOR THE SWORN TESTIMONY OF APPELLANTS' EXPERT, THOMAS PENDARVIS, IMPERMISSIBLY DISAGREEING WITH MR. PENDARVIS' SWORN TO FACTUAL OPINION AND DISMISSING APPELLANTS' THIRD PARTY COMPLAINT FOR PROFESSIONAL NEGLIGENCE AGAINST MS. CAREY, MR. LANEY, MR. POPE AND RPL.

Third Party Defendants brought an amalgam of pre-answer motions to dismiss the Third Party Complaint. Between the various party respondents, the motions were either to dismiss under Rule 12(b)(6), SCRCP, or to strike under Rule 12(f), SCRCP. The standard is the same for either rule – treat all well pleaded facts as true and admitted and do not go outside the pleadings.

The purpose of a Rule 12(f) motion to strike is to, *inter alia*; provide a means to remove materials in the pleadings that are redundant, immaterial, impertinent and scandalous. Rule 12(f), SCRCP. "In evaluating a Motion to Strike, the court must treat all well-pleaded facts as admitted and cannot consider matters beyond the pleadings." *Cherry v. Crow*, 845 F.Supp.1520,

1523 (M.D.Fla. 1994) (citing *U.S. Oil Co., Inc. v. Koch Refining Co.*, 518 F.Supp. 957, 959 (E.D.Wis. 1981)).

The ruling on a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (S.C. 1995), citing *State Board of Medical Examiners v. Fenwick Hall, Inc.*, 300 S.C. 274, 387 S.E.2d 458 (1990). A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). A Rule 12(b)(6), SCRCP, motion to dismiss is a procedural device used to test the sufficiency of a complaint. In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the Plaintiffs complaint and a 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the Plaintiff to any relief on any theory of the case." *Stiles, supra.*

The question is whether, in the light most favorable to the Plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the Plaintiff will prevail in the action. *Toussaint, supra.* See also *Kennedy v. Henderson*, 289 S.C. 393, 346 S.E.2d 526 (S.C. 1986) (where there is cause for doubt, or it is clear that the ends of justice may well be promoted by a trial on the merits, a demurrer should be denied where novel issues are present or are involved); *Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 153 S.E.2d 184 (S.C. 1967).

Here, neither the February 22, 2012, Order and the April 24, 2012, Order ("Third Party Orders") dismissing or striking the Third Party Counterclaims and Complaint were reviewed and decided under the proper standard for review. The Third Party Orders do not indicate what the

standard of review was for the findings of fact and conclusions of law. At the pre-answer pleading stage, the only question to be answered is whether, taking the facts as true and in the light most favorable to the non-movant, do the allegations state a claim under the law. As in the instant case, if there are factual questions in a matter at law, and the party has demanded a jury trial for all matters at law, the fact deciding must be done at trial before a jury, not at a Rule 12 motion hearing by a Master in Equity delegating his decision writing to Appellants'opposing counsel.

The Seventh Amendment to the U.S. Constitution preserves the right to trial by jury in "Suits at common law." See *Patterson v.McLean Credit Union*, 491 U. S. 164, 491 U. S. 211-212, 491 U. S. 216 (1989). When legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), quoting *Curtis v. Loether*, 415 U. S. 189, 415 U. S. 196, n. 11 (1974).

The court below ignored Appellants' demand for a jury trial and considered facts outside the pleadings in its Third Party Orders striking/and/or dismissing the Counterclaims and Third Party Complaint. [cite]. Moreover, the Master in Equity erred when he substituted his judgment disagreeing with Appellants Expert Affidavit from Thomas Pendarvis. [cite]. The Third Party Complaint for Professional Negligence against Ms. Carey, Mr. Laney, Mr. Pope and RPL was properly pled and the court erred in dismissing the affidavit and testimony of Mr. Pendarvis. None of the motions decided in the Third Party Orders were for summary judgment under Rule 56, SCRCP, and the court, without notice, impermissibly looked beyond the pleadings, impermissibly disagreed with the sworn facts of Appellants' expert, Thomas Pendarvis, and decided facts that properly were for a jury to decide. The court below committed reversible error

at the pleading stage and the Third Party Orders should be reversed and remanded with instructions.

III. BECAUSE APPELLANTS CHALLENGED THE AUTHENTICITY OF THE SIGNATURES ON THE MERS MORTGAGE AND REFINANCE NOTE UNDER SC CODE ANN. § 36-3-308 AND PROVIDED THE COURT WITH THE AFFIDAVIT OF DANIELLE STERLING, SWEARING SHE DID NOT ENDORSE THE REFINANCE NOTE AND DENYING THE SIGNATURE ON THE REFINANCE NOTE IS HERS, THE QUIET TITLE ACTION WAS IMPERMISSIBLY DISMISSED A SECOND TIME BECAUSE THE REFINANCE NOTE HAS NOT BEEN NEGOTIATED AS A MATTER OF LAW UNDER SC CODE ANN. § 36-3-203(c), CITIMORTGAGE IS NOT A HOLDER OF THE REFINANCE NOTE AS A MATTER OF LAW, AND THE BURDEN UNDER THE LAW IS SHIFTED TO CITIMORTGAGE TO PROVE ITS AUTHORITY TO ENFORCE THE DEBT EVIDENCED BY THE REFINANCE NOTE, SHOWING THAT THERE IS A GENUINE ISSUE OF FACT TO BE HEARD BY A JURY AT TRIAL.

SC Code Ann. § 36-3-308 states:

> (a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under Section 36-3-402(a).

"The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. "Burden of establishing" is defined in Section 1-201. The burden is on the party claiming under the signature, but the signature is presumed to be authentic and authorized except as stated in the second sentence of subsection (a). "Presumed" is defined in Section 1-201 and means that until some evidence is introduced which would support a finding

that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant. The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence. The defendant's evidence need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor. Until introduction of such evidence the presumption requires a finding for the plaintiff. *Once such evidence is introduced the burden of establishing the signature by a preponderance of the total evidence is on the plaintiff.*" SC Code Ann. § 36-3-308, Official Commentary 1. [Emphasis added].

Under SC Code Ann. 36-3-203(c), § 36-3-203 - Transfer of instrument; rights acquired by transfer:

> (c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, *but negotiation of the instrument does not occur until the indorsement is made.* [Emphasis added].

Here, Appellants challenged the signatures on the MERS Mortgage and the refinance note in their Answer, specifically under SC Code Ann. § 36-3-308. [cite]. CitiMortgage has filed two separate affidavits by the same person stating the first time that Bayview endorsed the refinance note to CitiMortgage [cite], and then in a second, "sham affidavit,"[5] stating on personal knowledge that Danielle Sterling endorsed the refinance note to CitiMortgage. [cite].

[5] See *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (S.C. 2004)," Federal courts, including the Fourth Circuit, have held a court may disregard a subsequent affidavit as a "sham," that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn

As a result of the conflicting pleadings, Appellants sued the purported endorser of the refinance note, Ms. Danielle Sterling and she in turn testified that she did not endorse the refinance note and that the signature on the refinance note is not hers. [cite]. As a result, under SC Code 36-3-308, the burden to prove the signatures on the endorsement has shifted to CitiMortgage and under 36-203(c), the refinance note has not been negotiated and CitiMortgage is not a holder as a matter of law. At best, CitiMortgge is a non-holder in possession of the refinance note. Whether CitiMortgage has lawful authority to enforce the refinance note is a question of fact that must go before a jury.

Appellants have met their burden under their pleadings and the law and have established a genuine issue of fact that goes to the heart of the second Quiet Title action that was dismissed in the February 22, 2012 Order – can CitiMortgage prove it owns the debt or the authority to enforce the debt in order to foreclose on the MERS Mortgage and the Oldfield Property – properly a question of fact for the jury. The Third Party Orders, both the February 22, 2012 and the April 24, 2012 Orders, dismissing Appellants, Counterclaims, Third Party Claims and second Quiet Title Action should be reversed and remanded with instructions.

IV. BECAUSE THE MASTER IN EQUITY FORCED AN ELECTION OF REMEDIES ONTO APPELLANTS *SUA SPONTE*, IN SPITE OF THE FACT THAT SOUTH CAROLINA RECOGNIZES THE TORT OF CIVIL CONSPIRACY FOR LAWFUL ACTS AS ORIGINALLY PLED BY APPELLANTS, THE FEBRUARY 22, 2012 ORDER FINDING *SUA SPONTE* THAT THE AMENDED ANSWER, COUNTERCLAIMS AND THIRD PARTY COMPLAINT IS REALLY A CLAIM FOR MALICIOUS PROSECUTION, IS AN ABUSE OF DISCRETION AND REVERSIBLE ERROR.

The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. *Tzouvelekas v. Tzouvelekas,* 206 S.C. 90, 33 S.E.2d 73 (S.C. 1945). Its purpose is to prevent double redress for a

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statement." See *Margo v. Weiss*, 213 F.3d 55, 63 (2nd Cir.2000); *Rohrbough v. Wyeth Labs. Inc.*, 916 F.2d 970, 976 (4th Cir.1990); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705 (3rd Cir.1988).

single wrong. Use of the doctrine is limited to cases where a double recovery by the plaintiff is threatened. *Save Charleston Foundation v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct.App.1985). When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both. *Id.* The plaintiff should have a full opportunity to prove his claim to some form of relief, but he should not receive a double recovery. Id. The invocation of one remedy constitutes an election of remedies that will bar another remedy consistent therewith where the suit upon the remedy first invoked reached the stage of final adjudication. *Cowart v. Poore,* 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) citing *Id.* See also *Brown v. Felkel*, 320 S.C. 292, 294, 465 S.E.2d 93, 95 (Ct.App.1995) cert. dismissed, 326 S.C. 36, 482 S.E.2d 564 (1997).

Appellants elected their remedy at law in pleading a civil conspiracy against the Third Party Respondents as opposed to a cause of action for malicious prosecution. This state recognizes a civil conspiracy cause of action for lawful acts. Appellants properly pled al the elements for their claim of civil conspiracy including special damages. [cite]. Regardless the February 22, 2012, Order stating the elements between civil conspiracy and malicious prosecution are the same, the court erred in changing Appellants' pleadings *sua sponte* and forcing the court's elected remedy on Appellants as opposed to allowing Appellants to prove their elected remedy pled – civil conspiracy. As a result of the court's error, Appellants have been prejudiced, and the February 22, 2012 Order should be reversed and remanded with instructions.

V. BECAUSE THE FORECLOSURE COMPLAINT DOES NOT SEEK TO ENFORCE THE DEBT OR SUE APPELLANTS ON THE REFINANCE NOTE AND IS AN ACTION FOR FORECLOSURE OF THE PURPORTED MORTGAGE ONLY THAT EXPRESSLY WAIVES ANY PERSONAL JUDGMENT OR DEFICIENCY JUDGMENT UNDER SC CODE ANN. §§29-3-650 AND 29-3-660 AGAINST APPELLANTS, THE MASTER IN EQUITY ERRED IN HOLDING

THAT DERIVATIVE LIABILITY FOR THE DEBT PURPORTEDLY SECURED BY THE MERS MORTGAGE MUST BE PLED IN ORDER TO STATE A THIRD PARTY CLAIM UNDER SOUTH CAROLINA LAW IN THIS ACTION.

Appellants demanded a jury trial on all issues of law. [cite]. Whether any of the Third Party Respondents are necessary parties requiring joinder, is a question of fact for discovery and ultimately a jury. "Common–law rules as to joinder of defendants have been largely changed by statute and court rule in various states; statutes relating to joinder should be liberally construed to avoid unnecessary litigation." 67A C.J.S. Parties § 59, September 2011. "The purpose of a provision liberalizing rules of joinder is to help the courts and to keep them from hearing the same cases twice, and to encourage the adjudication of rights and claims of all parties in one proceeding. A statute or rule relating to the joinder of parties should, with respect to parties defendant, be liberally construed to avoid unnecessary litigation." Id. The wording of the rule is specific as to its application to third-party practice, and "merely allows for the use of joinder as opposed to the lengthy acrobatics of third-party practice." *BancOhio National Bank v. John L. Neville, Sr., individually and as Personal Representative of the Estate of McCurry B. Neville, deceased, Rieppe N. Mays and Annette N. Clark*, 310 S.C. 323, 328, 426 S.E.2d 773 (S.C. 1993).

Here, the court below erred in looking to liability for the refinance note because the Foreclosure Complaint does not sue Appellants on the refinance note and expressly waives andy personal judgment or deficiency judgment under SC Code Ann. §§29-3-650 and 29-3-660. Appellants do not have to plead derivative liability for the refinance note debt if the underlying action is not seeking liability for the debt and has expressly waived seeking any personal judgment against Appellants. The cause of action for conspiracy is in and of itself based upon derivative liability as joint tortfeasors in each named parties' participation with CitiMortgage in bringing the instant fraudulent foreclosure action and that the matter as raised at the hearing is

without merit. It is within the Court's discretion to correct any err in the form of the Junks' pleading by renaming the alleged Third-party Defendant alleged joint tortfeasors as Counterclaim Defendants and necessary parties under Rules 14(c) and 19 SCRCP.

The lower court erred in dismissing Appellants Motion for Joinder of Third Parties as Counterclaim Defendants if it found that the use of third party practice was not proper. The February 22, 2012 Order should be reversed and remanded with instructions.

VI. BECAUSE THE RULE 12(b)(6), SCRCP STANDARD OF REVIEW WAS NOT USED IN THE APRIL 24, 2012 ORDER, THE MASTER IN EQUITY ERRED BY SUBSTITUTING HIS JUDGMENT FOR THAT OF A JURY ON FACTUAL ISSUES DECIDING WHEN APPELLANTS COULD HAVE KNOWN ABOUT THE CLAIMS AGAINST THE ORIGINATOR BY CONSIDERING FACTS OUTSIDE THE PLEADINGS IN DETERMINING THAT APPELLANTS COUNTERCLAIMS WERE OUTSIDE THE STATUTE OF LIMITATIONS.

"The statute of limitations for causes of action for fraud is governed by the discovery rule .. .. *"Burgess v. American Cancer Society~ S.C. Div., Inc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (internal quotations omitted). "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. *Dean v. Ruscon Corp.* 321 S.C. 360, 468 S.E.2d 645 (S.C.1996) citing *Johnston v. Bowen,* 313 S.C. 61, 437 S.E.2d 45 (1993). We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist. *Snell v. Columbia Gun Exchange, Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981). Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.,* 286

S.C. 207, 332 S.E.2d 555 (Ct.App.1985), *cert. granted,* 287 S.C. 234, 337 S.E.2d 697 (1985), *cert. dismissed,* 288 S.C. 468, 343 S.E.2d 613 (1986).

Here, none of the counterclaims have a statute of limitations less than three years. In their Answer to the mortgage foreclosure complaint, the Junks clearly state at ¶154 "[a]fter making their February 2009 payment to AHM, the Junks learned that AHM had been ordered liquidated on February 2009." At ¶155 the Junks clearly state "[b]efore making their next payment to a liquidated "Lender" the Junks sent a letter to their servicer CitiMortgage on March 6, 2009 request it produce a copy of the Junks' refinance note." At ¶157 the Junks clearly state "[o]n March 11, 2009 the Junks sent a Qualified Written Request ("QWR") to CitiMortgage under the Real Estate Settlement Procedures Act ("RESPA") 12 U.S.C. § 2601, et seq. requesting a full accounting of their payments and Funds as defined under ¶ 3 of the refinance note to determine how and to whom the Junks' payments to Conspirator CitiMortgage as the servicer of the refinance note were being applied in light of the AHM parties bankruptcy dated August 6, 2007 and subsequent liquidation order dated February 18, 2009. At ¶ 46 a-f, the Junks clearly state that they sent CitiMortgage a "notice of rescission under TILA, 15 U.S.C. §1635(b) and Reg. Z §§ 226.15(d)(l), 226.23(d)(l) to both the "Lender" of the Refi Note, AHM and to the servicer of the Junks' Refi Note at that time CitiMortgage - via USPS Certified Mail Return Receipt Requested."

Clearly the Junks Answer and Counterclaims demonstrates that they pled they were not aware nor should they have been aware of any issues with their refinance note and alleged mortgage prior to their Lender's liquidation order changing the Bankruptcy from Chapter 11 reorganization to Chapter 11 liquidation. Upon learning of their Lender's liquidation the Junks acted under RESPA and TILA within less than 36 days. When the facts pled are taken in the

light most favorable to the Junks, there is no question that February 18, 2009 is the day that a reasonable person would have been on notice of a claim associated with the Refi Note. As such, the Junks' Answer and Counterclaims that was filed on June 16, 2011 is well within three years and should not be dismissed at the pleadings stage as being barred by the statute of limitations.

As noted above the Junks rescinded the Refi Note under TILA Reg Z. Since we are at the pleading stage, not the summary judgment stage, the Junks' "TILA Rescission should be reviewed to see whether it was properly plead not whether they will ultimately prevail. In re Kain, Slip Copy, 2010 WL 5173794, Bkrtcy.D.S.C. (2010)." The court erred in dismissing Appellants Counterclaims against CitiMortgage and the April 24, 2012 Order should be revesred and remanded with instructions.

VII. BECAUSE THE MASTER IN EQUITY ABUSED HIS DISCRETION AND ERRED HOLDING THAT ATTORNEY NEGLIGENCE WAS "GOOD CAUSE" SHOWN FOR RELIEF FROM ENTRY OF DEFAULT, THE FEBRUARY 22, 2012, ORDER GRANTING COLONIAL COAST TITLE AGENCY RELIEF FROM DEFAULT SHOULD BE REVERSED AND REMANDED WITH INSTRUCTIONS.

"The standard for granting relief from an entry of default is good cause under Rule 55(c), SCRCP." *Richardson v. P.V. Inc.*, 383 S.C. 610, 682 S.E.2d 263, 266 (S.C. 2009). "In deciding whether good cause exists, the trial court should consider the following factors: (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted." Id. citing *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct.App.1989).

Negligence of an attorney or insurance company is imputed to a defaulting litigant and cannot constitute good cause for the relief from entry of default. See *Roberts v. Peterson*, 292 S.C. 149, 355 S.E.2d 280 (Ct.App.1987) (observing that the "courts of this state have

consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant") and *Williams v. Vanvolkenburg*, 312 S.C. 373, 440 S.E.2d 408 (Ct.App.1994) (imputing an attorney's negligence to a defaulting litigant).

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.* citing *Harbor Island Owners' Ass'n v. Preferred Island Prop., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (S.C. 2006).

VIII. BECAUSE THE MASTER IN EQUITY ABUSED HIS DISCRETION IN GRANTING AMERICAN HOME MORTGAGE RELIEF FROM ENTRY OF DEFAULT AND DENYING APPELLANTS' MOTION FOR DEFAULT JUDGMENT BASED ON THE FACT THE COURT IMPERMISSIBLY DISMISSED THE THIRD PARTY COMPLAINT, THE MAY 20, 2012 ORDER SHOULD BE REVERSED AND REMANDED WITH INSTRUCTIONS.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy; this is true when some event occurs making it impossible for the reviewing court to grant effectual relief." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (S.C. 2006); see also *Shah v. Richland Memorial Hosp.* 350 S.C. 139, 564 S.E.2d 681 (S.C.App. 2002); Curtis v. State, 345 S.C. 557, 549 S.E.2d 591, (S.C. 2001); *Seabrook v. City of Folly Beach*, 337 S.C. 304, 523 S.E.2d 462 (S.C. 1999). "In the civil context, there are three general exceptions to the mootness doctrine: first, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review; second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest; finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (S.C. App. 2002) (emphasis added). An appellate court

"will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 714 (1973).

Here, a judgment of default by the Circuit Court would have a practical legal effect upon the existing controversy. AHM is a necessary party to the underlying action and to the appeal of the February 22 Order currently pending before this Court – tracking No. 2012-210910. There remains an existing actual controversy as to necessary parties and the propriety of the Junks' Amended Answer, Counterclaims and Third-Party Complaint. The May 2nd Order is not moot therefore and this Court has jurisdiction to hear the instant appeal.

The lower court dismissed the Junks' original Quiet Title action "without prejudice" finding that CitiMortgage and Third-Party Defendant Bayview were necessary parties to the Quiet Title action and that the Junks should have named CitiMortgage and Bayview in the Quiet Title action [cite]. The Circuit Court's April 11, 2011 Order directed the Junks to re-file their quiet title action and any other claims they may have against all other parties in their answer to the mortgage foreclosure action [cite].

In their Amended Answer to the foreclosure action, the Junks asserted affirmative defenses, counterclaims and third-party claims, including a second quiet title claim. The Amended Answer asserts claims against CitiMortgage and the other third-party defendants, including AHM. The Junks' claims are based on the contention that CitiMortgage did not take the Refi Note from AHM as a holder in due course and is subject to all claims and defenses they have against the original "Lender" AHM [cite]. Per the Circuit Court's direction in the April 11 Order that avers to be "without prejudice," the Junks filed a Third-Party Complaint including the

same parties among others, in their Amended Answer which the Circuit Court previously deemed necessary parties to the Quiet Title. [cite].

The Junks' Amended Answer Counterclaims and Third-Party Complaint, pursuant to the April 11, 2011 Order alleges Civil Conspiracy and Slander of Title and Quiet Title against all parties – CitiMortgage as Counterclaim Defendant and all the Third-Parties listed in the Third-Party Complaint caption, of which MERS, Bayview and AHM were previously judicially held to be necessary parties in the April 11 Order. At the February 23, 2012 hearing on the subject motion for default judgment, the Circuit Court deemed the motion moot as a result of its previous order signed the day before on February 22, 2012, dismissing both the Junks' Third-Party Complaint and the Junks' Motion to Join all Third-Party Defendants as Counterclaim Defendants as Necessary Parties currently pending appeal before this Court, holding those claims as improper. The Circuit Court reasoned that the February 22 Order dismissing the Third-Party Complaint renders the default judgment motion against AHM moot, despite the fact that the Circuit Court's previous finding that MERS, AHM, CitiMortgage and Bayview were necessary parties in the first quiet title action.

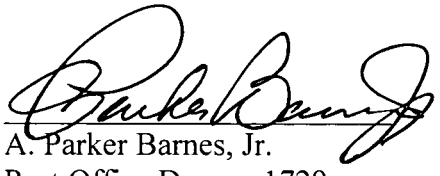
The lower court's May 20, 2012 Order denying Appellants' Motion for Default Judgment against AHM should be reversed and remanded with instructions based on the Master in Equity's abuse of discretion.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the February 22, 2012, April 24, 2012 and May 20, 2012 Orders issued by the Honorable Marvin Dukes, III be reversed and remanded with instructions for further proceedings.

{Signature Page to Follow}

A.PARKER BARNES, JR., P.A.



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