

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-in-Equity

Marvin H. Dukes, III, Master-in-Equity

Civil Action No.: 2009-CP-07-04301
&
Civil Action No.: 2009-CP-07-05088

CitiMortgage, Inc., ... Respondent,

v.

Daniel L. Junk and Christine H. Junk, and
Oldfield Community Association,

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

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

v.

CitiMortgage Inc., ... Counterclaim Respondent,

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., Lawyer Title Insurance
Corporation, Corelogic, Inc., and American
Home Mortgage Holdings, Inc., ...

Third-Party Respondents.

RECEIVED

APR 30 2012

SC Court of Appeals

Respondents CitiMortgage, Inc., Bayview Loan Servicing, LLC, Merscorp, Inc., Mortgage Electronic Registration Systems, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., Jennifer Oakes, and Robert G. Hall's Return to the Motion to Dismiss or Stay in the Alternative the Foreclosure Action Pending Appeal of Quiet Title Action

Pursuant to this Court's letter dated April 18, 2012 and Rule 240(e) of the South Carolina Appellate Court Rules, Respondent CitiMortgage, Inc.,¹ and Third-Party Respondents Bayview Loan Servicing, LLC, Merscorp, Inc., Mortgage Electronic Registration Systems, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., Jennifer Oakes, and Robert G. Hall (hereinafter "Third-Party Respondents") hereby submit this Return to Appellants Daniel L. Junk and Christine H. Junk ("the Junks") Motion to Dismiss or Stay in the Alternative the Foreclosure Action Pending Appeal of Quiet Title Action. For the reasons set forth below, this Court should not dismiss or stay the underlying foreclosure matter.

Procedural History

A brief recap of the procedural history of this litigation will assist in the analysis of this matter. This litigation began as two separate actions. One action was a quiet title action (Civil Action No. 2009-CP-07-04301) filed by the Junks brought against Mortgage Electronic Registration Systems, Inc. ("MERS") (this action hereinafter referred to as the "original quiet title action"). The second action is the foreclosure

¹ Respondent CitiMortgage, Inc., joins this Return because the Junks seek to have CitiMortgage's foreclosure action dismissed or stayed.

action (Civil Action No. 2009-CP-07-05088) against the Junks by CitiMortgage, Inc. (“CitiMortgage”).²

In the original quiet title action, MERS moved to dismiss. The Trial Court agreed and dismissed the quiet title action brought against MERS without prejudice. See April 12, 2011 Order, Exhibit A. In fact, the Trial Court’s order directed the Junks to assert whatever claims or issues they contend apply in their Answer to the foreclosure action.

The Junks appealed that April 12, 2011 Order to this Court. See Notices of Appeal dated May 12 and 23, 2011, Exhibit B. This Court found the April 12, 2011 Order was not immediately appealable and dismissed the appeal. See Order dated September 13, 2011 (finding the dismissal of the quiet title action without prejudice was not immediately appealable), Exhibit C. The Junks filed a petition for a writ of certiorari to have the Supreme Court review this Court’s dismissal of the appeal. See Petition for Writ of Certiorari dated December 30, 2011, Exhibit D. That writ remains pending before the Supreme Court.

While the appeal of the April 12, 2012 Order dismissing the original quiet title action was pending before this Court, the Junks filed an amended answer, counterclaims, and a third-party complaint in the foreclosure action brought by CitiMortgage. In that third-party complaint, the Junks reasserted the quiet title claim against MERS, this time with MERS as a third-party defendant.³ The Trial Court

² The foreclosure action was originally brought by Bayview Loan Servicing, LLC. CitiMortgage, Inc. was substituted as the plaintiff pursuant to the Trial Court’s Order filed April 12, 2011.

³ The quiet title action was asserted against all twenty-three third-party defendants named in the third party complaint.

issued an Order on February 22, 2012, dismissing the third party complaint in its entirety because it was procedurally improper under Rule 14, SCRCF. See February 22, 2012 Order, Exhibit E. The Junks filed a notice of appeal, seeking appellate review of the February 22, 2012 Order. See Notice of Appeal dated March 23, 2012, Exhibit F. The February 22, 2012 Order, and that Order alone, is the only matter currently on appeal before this Court.

In the foreclosure action, the Junks previously filed a Rule 12(b)(6) motion to dismiss. In that motion, the Junks specifically argued the master should dismiss the foreclosure for lack of standing. See Motion p. 4 (noting the April 12, 2011 Order addressed “The Junks’ Rule 12(b)(6) Motion to Dismiss the Foreclosure for Lack of Standing”); see also The Junks’ Brief in Support of Their Motion to Dismiss Pursuant to Rule 12(b)(6) filed April 6, 2010, Exhibit G. The Trial Court denied that motion. See April 12, 2011 Order, Exhibit A. In the appeal of April 12, 2011 Order, the Junks sought appellate review of the denial of this motion by this Court. In response to CitiMortgage’s Motion to Dismiss the Appeal, the Junks argued extensively that CitiMortgage and Third-Party Respondent Bayview Loan Servicing, LLC (“Bayview”), lacked standing to maintain the foreclosure action. See The Junks’ Return to Motion to Dismiss filed June 23, 2011, Exhibit H. This Court ultimately rejected the Junks’ position and dismissed the appeal of the April 12, 2011 Order. Again, the April 12, 2011 Order is no longer before this Court and the Junks’ petition for certiorari as to the appeal of that Order remains pending at the Supreme Court.

The Junks now file this motion asking this Court to dismiss or stay the underlying foreclosure action because CitiMortgage lacks standing to maintain the

action. In this motion, the Junks reassert the standing arguments previously rejected by the Trial Court and this Court. The Junks fully argued this standing issue to the Trial Court. The Trial Court specifically rejected this standing argument by denying the Rule 12(b)(6) motion in the April 12, 2011 Order. Likewise, this standing argument was made to this Court in their Return to the Motion to Dismiss the appeal of the April 12, 2011 Order. This Court rejected this argument and dismissed the appeal via its September 13, 2011 Order. Those issues are now pending before the Supreme Court in the Junks' petition for a writ of certiorari. Thus, the Junks attempt to use this motion to have this Court reconsider the standing argument that was previously rejected and is no longer before this Court.

Argument

I. This Court should deny the Junks' request to dismiss the foreclosure action that is not before this Court.

The Junks ask this Court to dismiss the foreclosure action currently pending before the Beaufort County Master-In-Equity based on a claim that the Master lacks subject matter jurisdiction to adjudicate the foreclosure. {Motion pp. 6-14}.⁴ This motion does not ask this Court to dismiss an action currently on appeal. Rather, the Junks seek to have this Court dismiss an action over which it has no jurisdiction. To the extent this motion is actually a writ of prohibition, this Court should still deny the relief. The Junks have adequate remedies available to them in the foreclosure action via the usual appellate process. Therefore, this Court should deny the motion. Third-Party Respondents will address each situation below.

⁴ The Junks' argument is divided into two lengthy sections. However, the relief sought in both can be simplified into one issue, namely that the Master lacks subject matter jurisdiction over the foreclosure action.

The Court should deny the motion to dismiss the foreclosure action for the following reasons. First, the motion improperly asks this Court to dismiss a matter not on appeal and still pending before the Trial Court. Such a motion is akin to seeking Rule 12(b)(6), SCRCP, relief from an appellate court. That is improper. This Court lacks the authority to rule on such a request. Because the foreclosure is not before this Court, this Court lacks jurisdiction over the foreclosure. See S.C. Code Ann. § 14-8-200 (limiting this Court's jurisdiction to matters on appeal). Accordingly, this Court cannot entertain the Junks' motion to dismiss, and should deny the motion to dismiss the foreclosure action.

Second, this motion improperly asks this Court to dismiss an action on grounds already rejected by the Trial Court and this Court. The Junks have previously requested the Master dismiss the foreclosure action for lack of standing. The Master denied that motion in the April 12, 2011 Order. The Junks appealed that Order, arguing to this Court that CitiMortgage and Bayview lacked standing to maintain the foreclosure action. This Court rejected this argument in its Order dismissing the appeal. This Court should adhere to its previous Order and allow the Supreme Court to determine whether the April 12, 2011 Order (which denied the Junks' Rule 12(b)(6) lack of standing motion) should be addressed by the Appellate Courts on the merits.

Third, addressing the merits of the Junks' motion would effectively allow appellate review of the denial of a Rule 12(b)(6), SCRCP, motion to dismiss despite the well-settled rule that such review is not allowed. The Junks' argued, in a Rule 12(b)(6), SCRCP, motion that plaintiff lacked standing to maintain the foreclosure action. That motion was denied. As this Court properly recognized in its September

13, 2011 Order, the denial of such a motion is not immediately appealable. If the Court were to now address the merits of the standing arguments set forth in this motion, the Court would effectively be allowing immediate appellate review of the denial of a Rule 12(b)(6), SCRPC, motion to dismiss. That would be improper. As a result, this Court should decline to address the merits of the Junks' motion to dismiss the foreclosure action and deny the motion in full.

Lastly, even if this motion can be construed as a writ of prohibition, this Court should still deny the motion. A writ of prohibition seeks to prevent the assumption and exercise of jurisdiction by a trial court in cases where wrong, damage, and injustice are likely to follow. State Bd. of Bank Control v. Sease, 188 S.C. 133, 198 S.E.2d 602 (1938). Our Supreme Court has noted the writ should be used with forbearance and caution and only in cases of necessity. Ex parte Jones, 160 S.C. 63, 158 S.E.2d 134 (1931). In particular, the writ should not issue when the trial court where the action was brought has subject matter jurisdiction and the usual remedies provided by law are adequate and complete. Woodworth v. Gallman, 195 S.C. 157, 10 S.E.2d 316 (1940). If an adequate remedy exists via appeal or otherwise, then the writ does not lie to review any order. Jones, 160 S.C. at 66, 158 S.E.2d at 137.

Masters-In-Equity possesses jurisdiction over a foreclosure action in this state. Subject matter jurisdiction refers to "the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994); Theisen v. Theisen, 394 S.C. 434, 440-41, 716 S.E.2d 271, 274 (2011). Subject matter jurisdiction relates only to a tribunal's constitutional or statutory power to adjudicate a case. Johnson v. S.C. Dept.

of Probation, Parole, & Pardon Servs., 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). It is well-settled that “subject matter jurisdiction **is not implicated** when the court possesses the power to hear and determine cases of the general class to which the proceedings in question belong.” Gainey v. Gainey, 382 S.C. 414, 424, 675 S.E.2d 792, 797 (Ct. App. 2009) (emphasis added); see also State v. Campbell, 376 S.C. 212, 656 S.E.2d 371 (2008); Johnston v. S.C. Dep’t of Lab., Licensing, and Reg., 365 S.C. 293, 617 S.E.2d 363 (2005); Fryer v. S.C. Law Enforcement Div., 369 S.C. 395, 631 S.E.2d 918 (2006).

Masters-In-Equity possesses the authority and power to adjudicate foreclosure actions in this State. Article V, § 11 of the South Carolina Constitution provides that “[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases” This grant of general jurisdiction includes foreclosure actions. See Meadors Bros. v. Skelton, 234 S.C. 134, 107 S.E.2d 1 (1959) (holding that in foreclosure actions subject matter jurisdiction lies with the Court of Common Pleas in the county where the property is located); 27 S.C. Jur. Mortgages § 105 (same).

A Master-In-Equity is:

[A] division of the circuit court, and the master-in-equity, as judge of the equity court, is entitled to all the benefits and subject to all the requirements of the South Carolina Bar and the rules of the Supreme Court in the same respect as circuit court and family court judges.

S.C. Code Ann. § 14-11-15. Thus, our Constitution and Legislature bestow subject matter jurisdiction on the Master-In-Equity to adjudicate foreclosure actions. See also Rule 53(c), SCRCP (“Once referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar

matter”). Therefore, the Beaufort County Master-In-Equity possesses the authority to adjudicate the pending foreclosure action.

Additionally, the Junks have an adequate remedy via appeal of any forthcoming foreclosure order, if needed. Should the Master enter foreclosure against the Junks, they can raise this issue in their appeal to this Court and, potentially, the Supreme Court. Thus, the writ should not issue because the Master possesses subject matter jurisdiction over the foreclosure, and the Junks have remedies via appeal. Therefore, this Court should deny the motion.

II. This Court should reject the Junks’ request to stay the foreclosure action.

The Junks seek to stay the foreclosure action “pending the final outcome of the appeal of the circuit court’s dismissal of the Junks’ quiet title action.” {Motion p. 14}. The motion, however, is not clear as to which quiet title action the Junks base their claim for relief. The Junks currently have two separate quiet title claims pending before this Court and the Supreme Court. Respondents assume the dismissal referenced in the motion relates to the Trial Court’s February 22, 2012 Order dismissing the quiet title action asserted in the Junks’ third party complaint. See Order dated February 22, 2012 p. 14, Exhibit E. This is the Order currently on appeal to this Court. The Junks also could be referencing the dismissal of the original quiet title action that was dismissed without prejudice by the Trial Court on April 12, 2011, the appeal from which was previously dismissed by this Court on September 13, 2011. The appeal of the April 12, 2011 Order remains pending before the Supreme Court. Respondents will address both scenarios. Neither scenario allows the foreclosure action to be stayed.

Thus, the Trial Court retains jurisdiction to adjudicate the foreclosure. As a result, the Junks' request to stay the foreclosure should be denied.

- a. **This Court should deny the motion because allowing the foreclosure action to proceed will not divest this Court of jurisdiction to hear the current appeal or cause a contested issue from becoming moot.**

Regardless of the basis for the Junks' requested relief, this Court should deny the motion because the Junks fail to assert any of the factors necessary to establish entitlement to relief under Rule 241, SCACR. The rule provides this Court should consider whether the order is necessary to preserve jurisdiction of the current appeal or to prevent a contested issue from becoming moot. Rule 241(c)(2), SCACR; see also Graham v. Graham, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (holding that the purpose of a supersedeas is to stay proceedings in the circuit court in order to preserve the status quo pending the determination of the appeal and to preserve to the moving party the fruits of a meritorious appeal that otherwise might be lost). The Junks were required to set forth the grounds for the petition. See Rule 241(d)(4)(B), SCACR ("The petition shall contain . . . the grounds for the petition. . . ."). Because they fail to support this motion with the required grounds, this Court should deny the motion. See Rule 240(g), SCACR (noting the failure of the moving party to comply with the Appellate Rules "may be deemed an abandonment of the motion or petition").

Even if argued, the grounds for relief under Rule 241, SCACR, are not present in this matter. This Court will not lose jurisdiction over the appeal of the February 22, 2012 Order dismissing the third-party complaint by allowing the foreclosure action to move forward in the Trial Court. The third-party claims were wholly independent of the claims in the underlying foreclosure action. Likewise, no contested issue will

become moot if this action proceeds in the Trial Court. The Junks' appeal of the April 12, 2011 Order dismissing the original quiet title action will remain pending before the Supreme Court, the current appeal of the February 22, 2012 Order dismissing third-party complaint will be reviewed by this Court, and the foreclosure action can proceed in the Trial Court. After the Trial Court enters an order on the foreclosure action, this Court would still have authority to review that order. Thus, the Junks will be afforded complete relief and no issue would be moot. Accordingly, the motion should be denied.

b. The foreclosure action should not be stayed pending appeal of the February 22, 2012 order dismissing the quiet title claim in the third-party complaint.

The Junks request the foreclosure action be stayed pending appellate resolution of this current appeal of the February 22, 2012 Order dismissing the quiet title claim against the third-party defendants. {Motion p. 14-15}. The appeal of the February 22, 2012 Order does not affect the underlying foreclosure. Thus, Rule 241, SCACR, cannot stay the foreclosure. This Court should deny the motion and allow the foreclosure action below to proceed.

The Junks claim the February 22, 2012 Order "denied their quiet title action a second time as a matter of law." {Motion p. 15}. The Junks misconstrue the nature of the February 22, 2012 Order to have this Court believe the quiet title action is related to the foreclosure action. This improperly characterizes the third-party action and its relation to the foreclosure action. The February 22, 2012 Order merely dismissed the Junks' third party complaint as to the third-party defendants as being procedurally

improper under Rule 14, SCRCPP, and denied the Junks' alternative request to join the third-party defendants as counterclaim defendants.

This Court cannot stay the foreclosure action based on the actual relief ordered in the February 22, 2012 Order. The appealed Order dismissed the Junks' third-party complaint only, finding the third-party complaint failed to assert claims that are derivative of the Junks' liability to CitiMortgage. That Order did not finally decide, or even address, any matters related to the foreclosure action except to make a procedural determination that the third-party claims were wholly unrelated to the foreclosure.⁵ Therefore, the Order did not decide any matters related to foreclosure. Nor does the dismissal of those claims affect the foreclosure action. As noted by the trial court, the third-party claims failed to allege any relation to the foreclosure action or that any third-party defendant would be derivatively liable to pay the Junks' mortgage debt. In short, each third-party claim was wholly unrelated to the issues in the foreclosure action. As a result, the automatic stay provisions set forth in Rule 241(a), SCACR, do not apply to the foreclosure action. See, e.g., S.C. Nat. Bank v. Devine Blossom, 321 S.C. 110, 113, 467 S.E.2d 767, 769 (1996) (recognizing that matters not decided in the order on appeal are not subject to the provisions of Rule 241, SCACR). This Court should deny the Junks' request to stay the foreclosure action.

⁵ Rule 14, SCRCPP, provides the basis for third-party practice. It is well-settled that this rule is "procedural only and does not create any substantive right. . . ." 24 S.C. Jur. Rules of Civil Procedure § 14.2; H. Lightsey, Jr. & J. Flannagan, South Carolina Civil Procedure 257 (2d ed. 1985).

- c. **This Court lacks the authority to stay the foreclosure action based on the Junks' appeal of the April 12, 2011 Order dismissing the original quiet title action.**

In the motion, the Junks attempt to stay the foreclosure action based on the April 12, 2011 Order dismissing the quiet title action without prejudice that was previously dismissed by this Court. {Motion p. 1 ¶ 2 (alleging CitiMortgage cannot proceed with the foreclosure “until the appeal of the quiet title action against . . . MERS is finally decided”)}). Such a claim lacks merit and cannot form the basis for relief under Rule 241, SCACR. The appeal of the April 12, 2011 dismissal of the quiet title action is no longer before this Court. As such, this Court lacks authority to stay the underlying foreclosure action. This Court should deny the motion.

As noted, this Court has previously analyzed and dismissed the Junks' appeal of the April 12, 2011 dismissal of their quiet title action. The Junks then sought certiorari review of this Court's dismissal by the Supreme Court. That petition remains pending at the Supreme Court. Further, as they sought certiorari review of this Court's order in that action, the Junks are well aware the quiet title action is no longer before this Court. Yet, the Junks appear to ask this Court to stay the underlying foreclosure action based on the appeal of the quiet title action. This is improper and frivolous. The appeal of the dismissal quiet title action has been dismissed by this Court as not immediately appealable and is currently pending certiorari review by the Supreme Court. As a result, this Court lacks the authority to stay the foreclosure action based on an appeal currently pending before the Supreme Court.

Moreover, this Court is bound by its previous ruling. This Court previously ruled that the April 12, 2011 dismissal of the quiet title action was not immediately

appealable. As a result, an appeal of the order dismissing the original quiet title action cannot stay any proceedings in the Trial Court. See, e.g., S.C. Pub. Serv. Auth. v. Arnold, 287 S.C. 584, 340 S.E.2d 535 (1986) (holding that when an order is interlocutory and not immediately appealable, the service and filing of a notice of appeal does not transfer jurisdiction to the appellate court or stay further proceedings in the trial court). The Court cannot issue an order contradicting its finding that the matter was not immediately appealable. Thus, this Court must reject the Junks' claim that the foreclosure action should be stayed pending appeal of the dismissal of the quiet title action.

In an attempt to circumvent this Court's prior holding that the dismissal of the quiet title action was not immediately appealable and could not stay the foreclosure order, the Junks misconstrue the nature of the February 22, 2012 Order. The Junks claim the February 22, 2012 Order "denied their quiet title action a second time as a matter of law." {Motion p. 15}. The Junks misrepresent the nature of the February 22, 2012 Order in an attempt to deceive this Court to order relief on grounds that it previously analyzed and rejected. Such a claim improperly attempts to have this Court believe the quiet title ruling is now a final, immediately appealable order that allows the Court to stay the foreclosure action. Such is improper.

As noted, the February 22, 2012 Order dismissed the Junks' quiet title action, along with the remainder of the third party complaint, as to the third-party defendants and denied the Junks' alternative request to join the third-party defendants as counterclaim defendants. Again, the February 22, 2012 Order did not rule, analyze, or even mention any issues related to the original April 12, 2011 Order, the appeal of

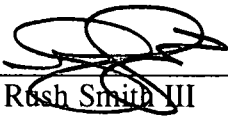
which remains pending before the Supreme Court. By claiming the February 22, 2012 Order determined the quiet title action “a second time,” the Junks frivolously seek to have this Court impose a stay based on grounds that they know are no longer before this Court. Such conduct should not be condoned. As a result, this Court should deny the motion.

Conclusion

Based on the foregoing, this Court should deny the motion to dismiss or stay the foreclosure action.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____


B. Rush Smith III

Brian P. Crotty

Michael J. Anzelmo

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Attorneys for Respondents CitiMortgage, Inc. and
Third-Party Respondents Bayview Loan Servicing,
LLC, Merscorp, Inc., Mortgage Electronic
Registration Systems, Inc., Citi Master Servicing,
Citigroup Global Markets Realty Corp., Citigroup
Mortgage Loan Trust, Inc., Jennifer Oakes, and
Robert G. Hall

Columbia, South Carolina

April 30, 2012

Exhibit A

(04/12/11 Order)

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Daniel L. Junk and Christine H. Junk,)

Plaintiff,)

vs.)

Mortgage Electronic Registration
Systems, Inc., and John Does 1-5000,)

Defendants.)

Civil Action No. 2009-CP-07-04301

ORDER

Bayview Loan Servicing, LLC)

Plaintiff,)

vs.)

Daniel Junk a/k/a Daniel L. Junk,
Christina H. Junk and Oldfield
Community Association,)

Defendants.)

Civil Action No. 2009-CP-07- 05088

ORDER

BEAUFORT COUNTY
COURT OF COMMON PLEAS
CLERK OF COURT

11 APR 12 PM 12:50

These related matters came before this Court for hearings on pending motions on December 4, 2010, and February 10, 2011. Both matters were referred to the Beaufort County Master-In-Equity with the consent of the Parties by Orders entered on May 25, 2010. The following motions were heard at the above mentioned hearings:

(a) In Junk v. Mortgage Electronic Registration Systems, Inc., et al. ("The Quiet Title Action"):

- (1) Defendant Mortgage Electronic Registration Systems, Inc.'s ("MERS") Motion to Dismiss filed Nov. 23, 2009;
- (2) Plaintiffs' Motion for MERS to Post an Indemnity Bond filed Nov. 22, 2010; and
- (3) Plaintiffs' Motion for Judgment on the Pleadings and Default Judgment filed Jan. 21, 2011.

(b) In Bayview Loan Servicing, LLC v. Daniel Junk et al. ("the Foreclosure Action"):

- (1) The Junk Defendants' Motion to Dismiss under Rules 13(a) and 12(b)(8) filed Nov. 25, 2009;
- (2) The Junk Defendants' Motion to Dismiss under Rule 12(b)(6) filed Nov. 25, 2009; and
- (3) Plaintiff's Motion to Substitute CitiMortgage, Inc. as Plaintiff filed Mar. 30, 2010.

On December 4, 2010, Daniel and Christine Junk were represented by A. Parker Barnes, Jr., Esq., and MERS, Bayview Loan Servicing, LLC ("Bayview") and CitiMortgage, Inc. ("CitiMortgage") were represented by Brian P. Crotty, Esq. On January 24, 2011, an Order was entered permitting Daniel Junk to represent himself *pro se* in both actions. At the February 10, 2011 hearing, Mr. Junk appeared *pro se*, while Mrs. Junk was represented by Mr. Barnes, and MERS, Bayview and CitiMortgage were represented by Mr. Crotty. This Court has carefully considered these motions, the supporting memoranda, affidavits, and other materials submitted by the parties and their counsel, the existing record in these matters, and the arguments offered by counsel for the parties. For the reasons stated herein, in the Quiet Title Action, this Court hereby denies Plaintiffs' Motion that MERS Post an Indemnity Bond; denies Plaintiffs' Motion for Judgment on the Pleadings and Default Judgment; and grants MERS' Motion to Dismiss without prejudice. Additionally, for the reasons stated herein, in the Foreclosure Action, this Court denies the Junks' Motions to Dismiss under Rules 13(a), 12(b)(6), and 12(b)(8), and grants Bayview's Motion to Substitute CitiMortgage as Plaintiff in the Foreclosure Action.

FACTUAL BACKGROUND

On November 3, 2006, Daniel and Christina Junk ("the Junks") entered into a mortgage loan transaction ("the Loan") to refinance existing mortgage loans secured by the real property known as 181 Oakfield Way, Okatie, South Carolina. This Loan was evidenced by an adjustable rate note ("the Note") executed by the Junks in favor of American Home Mortgage ("AHM") in the principal amount of \$1.2 Million. To secure repayment of the Loan evidenced by the Note, the Junks also executed a mortgage agreement ("Mortgage") expressly granting to MERS and the successors and assigns of MERS the mortgagee interest. The Mortgage disclosed that MERS held the security lien as nominee for Lender and Lender's successors and assigns.

Both the Note and the Mortgage executed by the Junks stated that the Note could be sold by AHM to one or more third parties. Specifically, the first page of the Note contains the following statement:

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

Note at ¶ 1. The Mortgage further states the following:

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A Sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written Notice of the Change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing....

Mortgage at ¶ 20.

The Mortgage also identified the role of MERS in this mortgage loan transaction. The first page of the Mortgage stated that **"MERS is the mortgagee under this Security Instrument"** (emphasis in original) and stated that **"MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns."** Mortgage at p. 1, ¶ (C). The Mortgage further states, under the heading **"TRANSFER OF RIGHTS IN THE PROPERTY"**:

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note, and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property....

Mortgage at p. 3 (emphasis added). Further, the Mortgage states,

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interest, including, but not limited to, the right to foreclose and sell the Property; **and to take any action required of Lender**, including, but not limited to, releasing and canceling this Security Instrument.

Id. (emphasis added).

The Junks have acknowledged that at the closing of their loan they were informed that the loan would be serviced by American Home Mortgage Servicing. (Plaintiff's Brief In Opposition to MERS' Mot. To Dismiss ("Pl.'s Opp. Brief") at p. 3). Shortly after the November 3, 2006 closing, AHM sold the Junks' Loan to CitiMortgage, Inc. ("CitiMortgage"). This sale of the Note is acknowledged by the Junks in their filings with the Court. (Pl.'s Opp. Brief at p. 11) (stating that AHM sold the Loan to

CitiMortgage on December 22, 2006). The Junks also admit that in January 2007 they received written notice from AHM that the servicing of this loan had been transferred to CitiMortgage. (*Id.*). Finally, the Junks admit that, beginning March 1, 2009, they stopped making any payments on the Note. (Pl.'s Opp. Brief at p. 5).

On March 6, 2009, The Junks sent CitiMortgage a letter requesting a copy of the Note and CitiMortgage responded by providing the Junks with both a copy of the Note and a copy of the Mortgage. (Pl.'s Opp. Brief at p. 4). The Junks then sent a letter purporting to be a Qualified Written Request under RESPA to both CitiMortgage and AHM.¹ (*Id.*). The Junks admit that this letter "requested a full accounting" and information regarding the application of their payments, rather than a statement outlining any alleged errors with the loan. (*Id.*). CitiMortgage responded to the Junks stating that their letter did not qualify as a Qualified Written Request under RESPA. (Pl.'s Opp. Brief at p. 5).

On March 23, 2009, the Junks sent another purported Qualified Written Request to AHM which included a "Notice of Claim and Rescission" purporting to rescind the Loan transaction. (Am. Compl. in the Quiet Title Action at ¶ 34). This was sent to AHM despite the fact that the Junks were aware that the servicing of the Loan was with CitiMortgage and that AHM had been in bankruptcy since August of 2007. (Pl.'s Opp. Brief at pp. 3-4). In this attempt to rescind the loan, the Junks included language in their letter which asserted that AHM's failure to rebut Plaintiffs' claim would result in the

¹ At this time, the Junks were aware that the servicing of their loan was handled by CitiMortgage and not American Home Mortgage. See Pl.'s Opp. Brief at p. 3 (acknowledging receipt in January 2007 of written notice that servicing of the Loan had been transferred to CitiMortgage). Thus, because RESPA's provisions regarding Qualified Written Requests apply only to "loan servicers," sending such a letter to AHM more than two years after both the Loan and servicing of the Loan had been transferred was of no effect. 15 U.S.C. § 2605(e); see also DeVary v. Countrywide Home Loans, Inc., 701 F. Supp. 2d 1096, 1106 (D. Minn. 2010) (holding that under RESPA only loan servicers are required to respond to any qualified written request from the borrower).

Plaintiffs purportedly being granted an "unlimited Power of Attorney" and "full authorization" to sign a satisfaction of the obligation. (Pl.'s Opp. Brief at p. 5). On April 20, 2009, apparently based AHM making no response to the March 23, 2009 letter, Daniel Junk recorded a "Satisfaction of Mortgage" in which he declared and represented himself to be an agent of AHM and the "owner and holder" of the Mortgage. (Pl.'s Opp. Brief at p. 7).

Following the Junk's suspension of making payments under the Note in March 2009, CitiMortgage began sending them correspondence and notices regarding their default status. Specifically, letters and notices were sent by CitiMortgage to the Junks on April 1, 2009, May 4, 2009, and May 19, 2009. (Pl.'s Opp. Brief at p. 7). In June of 2009, the servicing rights for the Junks' loan was transferred by CitiMortgage to Bayview Loan Servicing, LLC ("Bayview"). The Junks have acknowledged receiving written notice from CitiMortgage dated June 15, 2009, and written notice from Bayview dated July 1, 2009, informing them that the servicing of the Loan was transferred to Bayview. (Pl.'s Opp. Brief at p. 7). Following this transfer of servicing, Bayview sent the Junks correspondence and notices regarding their default status on July 6, 2009, July 9, 2009 and July 17, 2009. (Pl.'s Opp. Brief at p. 8). On July 21, 2009, the Junks sent a letter to Bayview disputing the debt. (Pl.'s Opp. Brief at p. 8). Bayview responded by identifying itself as the servicer of the loan, providing a loan history for the Plaintiffs' loan and informing them of the date of their default. (Pl.'s Opp. Brief at p. 8).

The Junks filed the Quiet Title Action on September 11, 2009, and amended their Complaint on September 14, 2009. The Defendants named in the Quiet Title Action are

AHM², MERS and John Does 1 – 5000. Despite being aware of the sale of the loan to CitiMortgage and the transfer of servicing rights to CitiMortgage and then to Bayview, the Junks excluded as named defendants these entities whom the Junks knew had an interest in this action and with whom the Junks had directly corresponded. Instead, the Junks included “John Doe” defendants who were served by publication.

On September 25, 2009, the Mortgage in this case was assigned by MERS to Bayview. This assignment was recorded on October 19, 2009. Following the recording of that assignment, Bayview initiated the Foreclosure Action on October 26, 2009. In March of 2010, the servicing rights regarding the Junks' Loan were transferred by Bayview back to CitiMortgage, and the Mortgage was assigned by Bayview to CitiMortgage. The assignment of the Mortgage by Bayview to CitiMortgage was recorded on March 19, 2010. Shortly thereafter, on March 30, 2010, a motion was filed in the Foreclosure Action to substitute CitiMortgage as the Plaintiff in that action in the place of Bayview.

ORDER

A. The Junk's Motion to Require MERS to Post an Indemnity Bond Is Denied.

Both the Quiet Title Action and the Foreclosure Action center on the Mortgage Loan entered into by the Junks on November 3, 2006. The Junk's motion seeking to have MERS's post an indemnity bond, however, relates not to the November 3, 2006 Mortgage, but instead to a prior mortgage dated September 26, 2005 (that was to be paid off as part of the November 3, 2006 mortgage loan transaction). The Junks admit that MERS, which was also the mortgagee on the 2005 Mortgage, filed a satisfaction as to the

² AHM was subsequently dismissed by Plaintiffs after it filed a Suggestion of Bankruptcy.

September 26, 2005 Mortgage, but assert that they never received the Note from the 2005 loan transaction marked paid in full or satisfied. Significantly, the Junks do not contend that any attempt by anyone has been made to collect on the 2005 Note in the more than four years since that loan was apparently paid off. The Junks' motion to require MERS to post a bond relating to the 2005 Mortgage is without any basis or support. The 2005 Mortgage has been satisfied of record, and there is no reason to justify this Court requiring MERS to post any bond. Thus, this motion is denied.

B. The Junks' Motion for Judgment on the Pleadings and for Default Judgment in the Quiet Title Action is Denied.

The Junk's Motion for judgment on the pleadings and default judgment is based on their claim that, because MERS has assigned the Mortgage to Bayview, MERS no longer has any interest in the property. Additionally, the Junks contend that Bayview falls within one of the "John Doe" defendants who were served with the Quiet Title Action by publication, and by failing to answer the Quiet Title action's Complaint, Bayview is in default. Because the Junks were aware that Bayview and CitiMortgage may have had an interest in the mortgage loan, and because the Junks would have been easily able to serve both Bayview and CitiMortgage through normal means, neither the inclusion of "John Doe" defendants, nor the use of service by publication was effective as to these entities.

Rule 10(a)(1), SCRPC allows the use of "john doe" parties "[w]hen a party does not know the name of an adverse party." Similarly, Rule 17(e), SCRPC specifically allows "unknown parties" to be named in quiet title actions. As for service on unknown parties, service by publication on "persons unknown" is authorized in quiet title actions. S.C. Code Ann. § 15-67-40. However, "such persons as are known or appear of record to

have some right, title, interest, estate or lien in or on the real property in controversy" must still be individually served. Id. A plaintiff is required to exercise due diligence to identify a method of service on all such parties before resorting to service by publication. S.C. Code Ann. §§ 15-9-710, 15-9-720.

Prior to filing the Quiet Title Action, the Junks had corresponded with both CitiMortgage and Bayview regarding the mortgage loan at issue. The Junks were well aware, based on the default warning letters they admit receiving from these entities, that one or both of them claimed some interest in the mortgage lien. Thus, neither Bayview nor CitiMortgage could be considered to be a proper "John Doe" defendant. Additionally, because the Junk's had been in direct communication with both Bayview and CitiMortgage, service by publication would be improper as to either entity, as such service may only be used where the party cannot be found within the State. Aside from having addresses for both Bayview and CitiMortgage, either entity's agent for service of process could have been ascertained through a simple search of the Secretary of State's database. Therefore, Bayview and CitiMortgage were not proper "John Doe" defendants in the Quiet Title Action, and the Junks' service by publication as to the John Doe defendants was of no effect as to either Bayview or CitiMortgage. Thus, The Junk's Motion for Judgment on the Pleadings and Default Judgment is hereby denied.

C. MERS' Motion to Dismiss the Quiet Title Action is Granted Without Prejudice.

As discussed above, Bayview and CitiMortgage were not properly made parties to the Quiet Title Action. Thus, MERS is the sole Defendant in that action. The Mortgage at issue has been assigned by MERS to Bayview, and by Bayview to CitiMortgage.

Additionally, this Court is simultaneously granting the motion substituting CitiMortgage as the Plaintiff in the Foreclosure Action that was initiated by Bayview while it was the servicer of the Loan and the holder of record of the Mortgage. The Junks' Quiet Title Action raises numerous issues challenging the validity and effect of the Mortgage that is the subject of the Foreclosure Action. In the interests of justice and judicial economy, these actions should be consolidated in some manner. Therefore, this Court hereby grants MERS' motion to dismiss the Quiet Title Action without prejudice, and directs the Junks to assert whatever claims or issues they contend apply in their Answer to the Foreclosure Action's complaint.

D. The Junks' Motion to Dismiss the Foreclosure Action under Rules 13(a) and 12(b)(8) is Denied.

The Junks contend that the Foreclosure Action should have been asserted by Bayview as a compulsory counterclaim to the Quiet Title Action under Rule 13(a), SCRCP. Additionally, the Junks contend that dismissal is appropriate under Rule 12(b)(8), SCRCP, because the Quiet Title Action constituted another action that was pending between the same parties for the same claim. However, as stated above, neither Bayview nor CitiMortgage were properly made parties to the Quiet Title Action. Therefore, neither Rule 13(a), nor Rule 12(b)(8) are applicable, and the Junk's Motion to Dismiss the Foreclosure action on these grounds is hereby denied.

E. The Junks Motion to Dismiss the Foreclosure Action Under Rule 12(b)(6) is Denied.

The Foreclosure Action Complaint asserts three separate causes of action: (1) fraudulent satisfaction of the mortgage, (2) reformation of the deed and/or mortgage, and (3) foreclosure of the mortgage. The Junks have moved to dismiss this Complaint under

Rule 12(b)(6), SCRCP on the following grounds: (1) Bayview lacked standing to bring the action; (2) the Mortgage that is the subject of the action is not a valid mortgage; (3) the Assignment of the Mortgage from MERS to Bayview was invalid; (4) any assignment of the Note and Mortgage was invalid due to AHM's bankruptcy; and (5) MERS' interest in the Mortgage was invalidated when AHM transferred the Note and no assignment of the Mortgage was recorded. None of these grounds provides a basis for dismissal of the Foreclosure Action Complaint under Rule 12(b)(6).

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Cole Vision Corp. v. Hobbs, 384 S.C. 283, 286, 680 S.E.2d 923, 924 (Ct. App. 2009). Copies of documents attached as exhibits to a pleading are a part of the pleadings. S.C. R. Civ. P. 10(c). "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." Id.

The Complaint includes three causes of action. Each claim expressly includes allegations sufficient to meet all required legal elements under South Carolina law, and satisfies the standard under Rule 8, especially when viewed in the required light most favorable to the Plaintiff, and with every doubt resolved in its behalf. The Junks' Motion does not allege that Plaintiff has improperly pleaded the referenced causes of action, and Plaintiff's Complaint can certainly be read to state valid claims for relief.

The Junks contend that Bayview lacked standing to bring the Foreclosure Action because it was not the holder of the Note. At the time the Foreclosure Action was initiated by Bayview, it was the servicer of the Junks' loan. In the case of In re

Woodberry, 383 B.R. 373, 379 (D.S.C. Bankr. 2008), the U.S. District Court for the District of South Carolina held "that a loan servicer, with a contractual duty to collect payments and foreclose mortgages in the event of default, has standing to move for relief from stay in the Bankruptcy Court." Subsequent decisions in the District of South Carolina have extended this to apply where the servicer did not hold the note. Harris v. Option One Mortgage Corp., 261 F.R.D. 98, 103-04 (D.S.C. 2009); In re Dendy, 396 B.R. 171, 178 (D.S.C. 2008) (noting that the servicer was the general agent for the holder of the mortgage by servicing the loan and collecting the loan payments). This view follows the holdings in other jurisdictions that loan servicers have standing to bring foreclosure actions by virtue of their pecuniary interest in collecting payments under the terms of the note and mortgage. In re Tainan, 48 B.R. 250, 252 (E.D. Pa. 1985) (servicer is real party in interest under Rule 17(a) for relief from stay); Bankers Trust v. 236 Beltway, 865 F. Supp 1186 (E.D. Va. 1994) (both lender and servicer have standing to foreclose even if servicer is not the holder of the mortgage); In re O'Dell, 268 B.R. 607, 618 (N.D. Ala. 2001) aff'd 305 F.3d 1297 (11th Cir., 2002) (servicer is real party in interest in proceedings involving loans which it services); In re Miller, 320 B.R. 203 (N.D. Ala 2005) (servicer permitted to seek relief from stay). Thus, the Junk's contention that Bayview lacks standing is without merit.

Even if Bayview had lacked standing to bring the Foreclosure action, any issue as to standing is resolved by the substitution of CitiMortgage as the Plaintiff. The original Note, bearing an endorsement from AHM to CitiMortgage, is in CitiMortgage's possession. Additionally, CitiMortgage is the current assignee of record of the Mortgage. Rule 17(a), SCRPC provides that "[n]o action shall be dismissed on the ground that it is

not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." Thus, any issue as to standing is resolved by CitiMortgage's substitution as Plaintiff in this action.

The Junks' remaining grounds are not properly applicable to a Rule 12(b)(6) motion. This Court must consider the Complaint in the light most favorable to the plaintiff, and with every doubt resolved in its behalf. Under this standard, the Plaintiff has stated facts sufficient to establish the causes of action asserted. Therefore, the Junks' Motion to dismiss under Rule 12(b)(6) is hereby denied.

F. Bayview's Motion to Substitute CitiMortgage as the Plaintiff in the Foreclosure Action Is Granted.

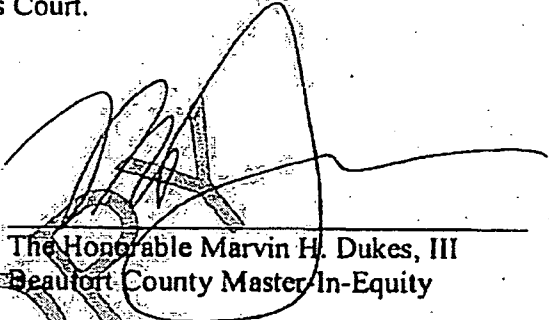
Bayview has moved, pursuant to Rule 25(c) to substitute CitiMortgage as the Plaintiff in the Foreclosure Action. This motion is based on the assignment of the Mortgage from Bayview to CitiMortgage. Additionally, substitution of CitiMortgage is also appropriate under Rule 17(a) based upon CitiMortgage's possession of the original Note bearing an endorsement to CitiMortgage and the fact that it is now also the holder of record of the Mortgage. This Court hereby grants the motion to substitute CitiMortgage as the Plaintiff in the Foreclosure Action and orders that the Foreclosure Action be hereinafter captioned as: "CitiMortgage, Inc. v. Daniel L. Junk, Christina H. Junk and Oldfield Community Association."

CONCLUSION

For the reasons stated herein, in the Quiet Title Action, this Court hereby: (a) denies Plaintiffs' Motion that MERS Post an Indemnity Bond; (b) denies Plaintiffs' Motion for Judgment on the Pleadings and Default Judgment; and (c) grants MERS'

Motion to Dismiss without prejudice. Because the Quiet Title Action has now been dismissed any other motions pending therein are hereby denied as moot. As for the Foreclosure Action, for the reasons stated herein, this Court hereby: (a) denies the Junks' Motions to Dismiss under Rules 13(a), 12(b)(6), and 12(b)(8); and (b) grants Bayview's motion to substitute CitiMortgage as Plaintiff. Pursuant to Rule 12(a), SCRCP, the Junks shall have fifteen (15) days from the their receipt of this Order to file a responsive pleading to the Foreclosure action Complaint, unless a Scheduling Order designating a different timeframe is entered by this Court.

IT IS SO ORDERED



The Honorable Marvin H. Dukes, III
Beaufort County Master-In-Equity

April 11, 2011

COPY

Exhibit B

**(05/12/11 & 05/23/11 Notices
of Appeal)**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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.

NOTICE OF APPEAL

Daniel L. Junk and Christine H. Junk appeal the order of the Honorable Marvin H. Dukes, III dated April 11, 2011. Appellants received written notice of entry of this order on April 17, 2011.

May 12, 2011

A. Parker Barnes, Jr.
Post Office Drawer 1729
500 Carteret Street
Beaufort, South Carolina 29901
(843) 522-2600
Counsel for Appellant Christine Junk

Daniel L. Junk, J.D.
Pro Se Appellant
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

Other Counsel of Record:

Brian P. Crotty
Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201
Counsel for Respondent Mortgage Electronic Registration Systems, Inc.
(803) 255-9422

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity

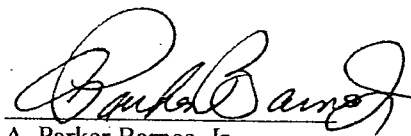
Case No. 2009-CP-07-05088

Bayview Loan Servicing, LLC Respondent,
v.
Daniel Junk a/k/a Daniel L. Junk and Christine H. Junk,
and Oldfield Community Association Appellants.

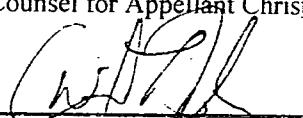
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Bayview Loan Servicing LLC and Oldfield Community Association by depositing a copy of it in the United States Mail, postage prepaid, on May 12, 2011, addressed its respective attorneys of record, Brian P. Crotty, Nelson Mullins Riley & Scarborough LLP, Meridian, 17th Floor, 1320 Main Street, Columbia, SC 29201 and Andrew Colvin, Nexsen Pruet, 400 Main Street Office Campus, Suite 100A, Hilton Head Island, SC, 29926.

May 12, 2011



A. Parker Barnes, Jr.
Post Office Drawer 1729
500 Carteret Street
Beaufort, South Carolina 29901
(843) 522-2600
Counsel for Appellant Christine Junk



Daniel L. Junk, J.D.
Pro Se Appellant
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity

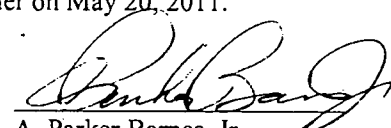
Case No. 2009-CP-07-05088

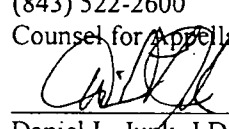
Bayview Loan Servicing, LLC Respondent,
v.
Daniel Junk a/k/a Daniel L. Junk and Christine H. Junk,
and Oldfield Community Association Appellants.

AMENDED NOTICE OF APPEAL

Daniel L. Junk and Christine H. Junk appeal the order of the Honorable Marvin H. Dukes, III dated May 20, 2011. Appellants received written notice of entry of this order on May 20, 2011.

May 23, 2011


A. Parker Barnes, Jr.
Post Office Drawer 1729
500 Carteret Street
Beaufort, South Carolina 29901
(843) 522-2600
Counsel for Appellant Christine Junk


Daniel L. Junk, J.D.
Pro Se Appellant
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

Other Counsel of Record:

Brian P. Crotty
Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201
Counsel for Respondent Bayview Loan Servicing, LLC
(803) 255-9422

Andrew Colvin
Nexsen Pruet
400 Main Street Office Campus
Suite 100A
Hilton Head Island, SC, 29926
Counsel for Oldfield Community Association
(843) 689-6277

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 -CP- 07 - 04301

Daniel L. Junk and
Christine H. Junk

Mortgage Electronic
Electronic Registration
Systems, Inc., et al.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Plaintiffs' Rule 59(e) Motion is hereby denied. All proceedings in the Foreclosure Case No. 2009-CP-07-0508 are hereby stayed until further notice by the Court pursuant to Chief Justice Toal's Administrative Order 2009-05-22-01 until Plaintiff's counsel certifies to this Court that all directives in the Order have been satisfied.

Dated at Beaufort, South Carolina, this 22th day of May, 2011.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

A. Parker Barnes, Jr.
P.O. Drawer 1729
500 Carteret Street
Beaufort, SC 29901-1729

Brian P. Crotty
Nelson Mullins & Riley
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Exhibit C

(09/13/11 Order)

The South Carolina Court of Appeals

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

v.

Mortgage Electronic Registration
Systems, Inc., and John Does 1-5000, Respondents,

and

Bayview Loan Servicing, LLC, Respondent,

v.

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

Of Whom Daniel L. Junk and Christina
H. Junk are Appellants.

The Honorable Marvin Dukes, III
Beaufort County

Trial Court Case Nos. 2009-CP-07-04301 and 2009-CP-07-05088

ORDER

Appellants filed Notices of Appeal from the master's orders (1) dismissing their quiet title action and denying their motion to require Mortgage Electronic Registration Systems, Inc., (MERS) to file an indemnity bond, and (2) permitting CitiMortgage, Inc., to substitute for Bayview Loan Servicing, LLC, (Bayview) in Bayview's foreclosure action and declining to dismiss the foreclosure action. This court consolidated the appeals. Respondents filed a motion to dismiss the consolidated appeal. After Appellants filed a return five days late, Respondents

filed a motion to strike Appellant's return as untimely and another motion for an extension of time to file their reply. Appellants then filed a motion for leave to file their return out of time.

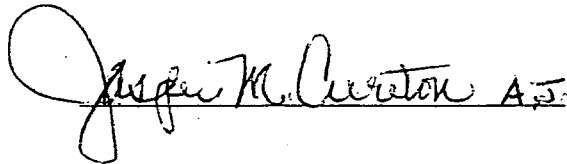
After careful consideration, we grant Appellants' petition to file their return to the motion to dismiss out of time, and we deny Respondents' motion for an extension of time to file a reply and motion to strike Appellants' return as untimely. Finally, we grant Respondents' initial motion and dismiss the consolidated appeal because neither order challenged herein is immediately appealable. See S.C. Code Ann. § 14-3-330 (1976 & Supp. 2010) (permitting appeal from an order that affects a party's substantial right and "(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, . . . or (c) strikes out an answer or any part thereof or any pleading in any action").

As to the master's order denying Appellants' motion to require MERS to file an indemnity bond and dismissing Appellants' quiet title action: Int'l Fidelity Ins. Co. v. China Constr. America (SC) Inc., 375 S.C. 175, 181, 650 S.E.2d 677, 680 (Ct. App. 2007) ("[A] dismissal of a claim without prejudice is not an adjudication of the merits of the controversy and has no preclusive effect as a matter of law." (citing McEachern v. Black, 329 S.C. 642, 651, 496 S.E.2d 659, 663 (1998))); Collins v. Sigmon, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989) (recognizing when a court dismisses a case without prejudice, "the plaintiff can reassert the same cause(s) of action" in another case) (internal quotation marks omitted).

As to the master's order permitting CitiMortgage, Inc., to substitute for Bayview in the foreclosure action and declining to dismiss the foreclosure action: McLendon v. S.C. Dep't of Highways & Pub. Transp., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (interpreting § 14-3-330 and holding that, like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be

raised again at a later stage of the proceedings and, therefore, is not directly appealable); Neeltec Enters., Inc. v. Long, 391 S.C. 177, 179, 705 S.E.2d 57, 58 (Ct. App. 2011) (noting an order substituting parties is not immediately appealable when it is not final and does not "fit within a statutory exception permitting an appeal from an interlocutory order").

AND IT IS SO ORDERED.

A handwritten signature in cursive script, appearing to read "Judge M. Curston A.S.", written over a horizontal line.

Columbia, South Carolina

cc: A. Parker Barnes, Jr., Esquire
Daniel L. Junk, J.D.
Brian P. Crotty, Esquire
Michael J. Anzelmo, Esquire

A rectangular stamp with the word "FILED" in bold, capital letters. Below it, the date "9/13/11" is handwritten, followed by a signature.

Exhibit D

(12/30/11 Petition for Writ)

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

Daniel L. Junk and Christine H.
Junk,

Petitioners,

v.

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

Respondents,

Case No. 2009-CP-07-04301

Bayview Loan Servicing, LLC,

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,

Petitioners.

Case No. 2009-CP-07-05088

PETITION FOR A WRIT OF CERTIORARI

A. Parker Barnes, Jr.
Post Office Drawer 1729
500 Carteret Street
Beaufort, South Carolina 29901
(843) 522-2600
Counsel for Petitioner Christine Junk

Daniel L. Junk, J.D.
Pro Se Petitioner
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

Other Counsel of Record:

Brian P. Crotty
Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201
Counsel for Respondents Mortgage Electronic Registration Systems, Inc.;
Bayview Loan Servicing, LLC; and; CitiMortgage, Inc.
(803) 255-9422

INDEX

QUESTIONS PRESENTED.....	1
STATEMENT OF THE CASE.....	1
ARGUMENT	
I. THE COURT OF APPEALS ERRED BY OVERLOOKING PETITIONERS' APPEAL OF THE CIRCUIT COURT'S ORDER DENYING PETITIONERS' RULE 12(C) SCRPC MOTION IN THE QUIET TITLE ACTION AND RULE 13(A) AND 12(B)(8) SCRPC MOTIONS IN THE FORECLOSURE ACTION IN BOTH THE ORDER GRANTING RESPONDENTS' MOTION TO DISMISS THE ORDER DENYING THE PETITION FOR A REHEARING.....	8
A. THE CIRCUIT COURT'S ORDER DENYING PETITIONERS' RULE 12(c) SCRPC MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFAULT JUDGMENT IMPERMISSIBLY CONSIDERED FACTS OUTSIDE THE PLEADINGS INVOLVING THE MERITS PREVENTING A JUDGMENT FROM WHICH AN APPEAL MIGHT BE TAKEN AND IS IMMEDIATELY APPEALABLE UNDER SC CODE ANN. §§ 14-3-330 (1) AND 2(a).....	9
B. THE CIRCUIT COURT'S RULE 12(b)(6) SCRPC DISMISSAL OF THE QUIET TITLE ACTION INVOLVES THE MERITS AND STRIKES PETITIONERS' RULE 13(a) AND 12(b)(8) SCRPC PRE-ANSWER PLEADINGS IN THE FORECLOSURE ACTION AND IS IMMEDIATELY APPEALABLE UNDER SC CODE ANN. §§ 14-3-330 (1) AND (2)(c).....	11
CONCLUSION.....	12

QUESTIONS PRESENTED

1. Did the Court of Appeals err in overlooking Petitioner's notice of appeal of the circuit court's order in the quiet title action dismissing Petitioner's Rule 12(c) SCRC motion for Judgment on the Pleadings and Default Judgment?
2. Did the Court of Appeals err in overlooking Petitioner's notice of appeal of the circuit court's order in the quiet title action striking Petitioners' Rule 12(b)(8) and 13(a) SCRC pre-answer pleadings in the separate Foreclosure Action?

STATEMENT OF THE CASE

On September 11, 2009, petitioners filed the quiet title action against the parties named in the only publicly recorded lien (MERS Mortgage) on their property and John Does 1-5,000. The MERS Mortgage named American Home Mortgage (AHM) as "Lender" and Respondent Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee mortgagee of "Lender." AHM, MERS and John Does 1-5,000 were all timely and properly served with the summons and complaint.

AHM filed a Suggestion of Bankruptcy in the circuit court dated September 25, 2009¹ for its response to the quiet title action. The Suggestion of Bankruptcy stated that AHM and its affiliated entities were under the protection of the U.S. Bankruptcy Trustee as of August 6, 2007 citing 11 U.S.C. § 362. MERS filed its answer stating it assigned petitioners' MERS Mortgage and promissory note (Note) to non-party respondent Bayview Loan Servicing, LLC (Bayview) on September 25, 2009 – the same day MERS' principal, AHM, executed its Suggestion of Bankruptcy filed in the quiet title action.

MERS' answer to the quiet title action states that, *as mortgagee* (as opposed to nominee mortgagee for bankrupt AHM), MERS assigned the Note and MERS Mortgage to Bayview and should be dismissed from the quiet title action therefor. At that time, MERS' counsel for its

¹ American Home Mortgage Corp., as opposed to the named "Lender" American Home Mortgage, filed a Suggestion of Bankruptcy in lieu of an Answer and Petitioners non-suited American Home Mortgage without prejudice. (See Appendix Exhibit 1 April 11, 2011 Order p. 7 FN 2).

answer, Ms. Heidi Carey, Esq. and Riley Pope & Laney, LLC, was the same counsel for Bayview in recording the assignment from MERS to Bayview attached as Exhibit A to the MERS' answer.

In its answer to the quiet title action, MERS admits the following:

17. That MERS admits the allegations contained in paragraph 33 to the extent that they are a matter of public record. All remaining allegations are denied.²

Additionally, MERS' answer in the quiet title action pleads:

FOR A THIRD DEFENSE

23. That the Defendant MERS incorporates all above allegations.

24. That the Defendant MERS should be dismissed as it has assigned the subject mortgage to Bayview Loan Servicing, LLC a Delaware Limited Liability Company by assignment dated September 25, 2009, which is to be recorded in the Beaufort County Register of Deeds (attached hereto as Exhibit A).

MERS did not plead the affirmative defense that Bayview or CitiMortgage were necessary parties to the quiet title action. Despite the claimed assignment of the MERS Mortgage and Note to Bayview after the quiet title action had been served on MERS and despite the fact that MERS' counsel in the quiet title action was also Bayview's counsel in recording the assignment from MERS, Bayview never appeared in the quiet title action.

On November 23, 2009 MERS filed a motion to dismiss the quiet title action under Rule 12(b)(6) SCRCF. On January 21, 2011 Petitioners filed a motion for judgment on the pleadings under Rule 12(c) SCRCF against MERS and for default judgment against John Does 1-5,000.

On October 27, 2009, in a separate and subsequent action, Respondent Bayview filed the

² See quiet title Amended Complaint at p. 7, ¶ 33 – “33. That MERS is not a legal title holder and has no interest in the “would-be” Note or subject property and as such is not a holder in due course, and as such has no right title or interest in the real estate which is the subject of this action.”

foreclosure action against Petitioners. The foreclosure action was brought by Ms. Heidi Carey, Esq. and Riley Pope & Laney, LLC, now as counsel for both MERS in the quiet title action and Bayview in the foreclosure action. Ms. Heidi Carey, Esq. verified Bayview's foreclosure action by affidavit on personal knowledge stating her client Bayview was the owner and holder of the MERS Mortgage and Note. In spite of Ms. Carey's affidavit on personal knowledge that her client Bayview was the owner and holder of the Note, the Note attached to the foreclosure complaint is not made payable to Bayview; is not endorsed to Bayview; nor, is the Note endorsed in blank.

On November 25, 2009 Petitioners filed three (3) pre-answer pleadings to dismiss the foreclosure action: i) under Rule 12(b)(6) for failure to state a claim as a result of Bayview's lack of standing as a result of its inability to enforce the Note since the Note was not made payable to Bayview; not endorsed to Bayview; and, not endorsed in blank; ii) under Rule 13(a) SCRPC as a compulsory counterclaim to the quiet title action requiring the foreclosure action be dismissed and Bayview's claims be brought in the previously filed quiet title action; and, iii) under Rule 12(b)(8) SCRPC because the parties in the foreclosure action were the same parties as in the quiet title action.

On March 17, 2010 Bayview assigned the Note and MERS Mortgage to CitiMortgage. Each assignment of the Note and MERS Mortgage – September 25, 2009 and March 17, 2010 – was allegedly executed by the same person – Robert G. Hall – as Vice President of Bayview and also as an officer of MERS.³

On March 30, 2010 in the foreclosure action, Mr. Roy Laney, Esq., Riley Pope & Laney, LLC and Bayview made a joint motion with Ms. Scott Möise, Esq. and Nelson Mullins, Riley & Scarborough (Nelson Mullins) under Rule 25(c) SCRPC. The joint motion i) substituted Nelson

³ See Appendix Exhibit 2 Affidavit of Lynn Szymoniak as Defendants' Expert filed in the circuit court May 4, 2010.

Mullins as counsel for MERS in the quiet title action; ii) substituted Nelson Mullins as counsel for Bayview in the foreclosure action; and, iii) substituted CitiMortgage, Inc. (CitiMortgage) as plaintiff for Bayview in the foreclosure action. Both counsel for Bayview and CitiMortgage attested to the circuit court that Bayview *sold and endorsed* the Note and MERS Mortgage to CitiMortgage on March 9, 2010 – despite the fact that the Note already contained an endorsement to CitiMortgage on October 27, 2009 when the foreclosure complaint was filed with a copy of the Note attached as an exhibit thereto.

The March 30, 2010 joint motion in the foreclosure action was supported by the affidavit of Ms. Jennifer Oakes, a “Legal Support Specialist” for CitiMortgage. Ms. Oakes’ affidavit states under oath and the penalty of perjury that:

PERSONALLY APPEARED BEFORE ME Jennifer Oakes, upon penalty of perjury, who being duly sworn, deposes and says the following:

1. I am a Legal Support Specialist with CitiMortgage, Inc., (CitiMortgage). I submit this Affidavit in support of the Motion for Substitution of Plaintiff and for Substitution of Counsel for Substitute Plaintiff in the above-captioned foreclosure action. The contents herein are based on my personal knowledge, except when based upon a review of CitiMortgage's books and records, and I am competent to swear to the matters herein.
2. *On or about March 9, 2010, CitiMortgage acquired the Promissory Note ("Note") and Mortgage that are the subject of this action from Bayview Loan Servicing, LLC ("Bayview"). Mortgage Electronic Registration Systems, Inc. ("MERS") is the mortgagee under the Mortgage as nominee for CitiMortgage and, previously, as nominee for Bayview. The original Note and Mortgage are in CitiMortgage's possession, and the Note has been indorsed to CitiMortgage by Bayview. Emphasis added.*

On December 6, 2010 Bayview, through its most recent and current counsel, Brian P. Crotty, Esq., also of Nelson Mullins & Riley, filed a Supplemental Affidavit of Jennifer Oakes wherein she now states, again under the penalty of perjury, that:

7. *CitiMortgage purchased the Note from American Home Mortgage and took possession of the original indorsed Note on or before January 22, 2007.* Emphasis added.
8. CitiMortgage's possession of the original Note on January 22, 2007, is evidenced by the fact that the Note was imaged into CitiMortgage's electronic records system on that date. The Note that was imaged into CitiMortgage's records on January 22, 2007, bears an indorsement on page 5 of the Note stating "PAY TO THE ORDER OF Citimortgage, Inc. WITHOUT RECOURSE BY: AMERICAN HOME MORTGAGE" signed by Danielle Sterling, Asst. Secretary. This is the only indorsement on the Note. A copy of the imaged Note retrieved by me from CitiMortgage's electronic records system is attached hereto as Exhibit A.

On December 6, 2010 and February 10, 2011 the circuit court heard the motions in both the quiet title action and the foreclosure action. The circuit court considered a multitude of issues outside the pleadings in hearing MERS' Rule 12(b)(6) SCRCP motion to dismiss the quiet title action. At the quiet title hearings, the circuit court allowed Mr. Crotty, who represented MERS in the quiet title action and Bayview and CitiMortgage in the foreclosure action, to put forth facts and arguments outside the pleadings of the quiet title action. Issues regarding whether non-party CitiMortgage owned the Note; non-parties Bayview and CitiMortgage having an interest in the Note as servicers; and, the amount due on the Note, among other things.

On April 11, 2011 the circuit court issued an order dismissing the quiet title action without prejudice in the interests of judicial economy – not for failure to state a claim – directing Petitioners to bring their quiet title claims in their answer to the foreclosure action. The circuit court's order ignores the fact that MERS had already assigned its interest, if any, post the filing of the quiet title action but prior to filing its answer and the circuit court's order prevents Petitioners from having their day in court against MERS and its now prior purported MERS Mortgage lien on their property that existed at the time the quiet title action was filed.

As a result of the dismissal of the quiet title action, the circuit court did not hear or rule

on Petitioners' Rule 12(b)(8) and 13(a) SCRCP motions in the foreclosure action. The circuit court order states that because the quiet title action had been dismissed, the Rule 13(a) compulsory counterclaim and 12(b)(8) same parties motions were no longer applicable in the foreclosure action and therefore denied. The granting of the quiet title action struck Petitioners pleadings in the foreclosure action.

The circuit court also granted Bayview's and CitiMortgage's joint Rule 25(c) SCRCP motion to substitute CitiMortgage. The circuit court ignored the fact that CitiMortgage filed a supplemental affidavit after it filed the original motion now stating it has always owned the Note as opposed to buying it from Bayview – completely contradicting the veracity and purpose of the original Rule 25(c) SCRCP motion.

The circuit court also denied Petitioners' Rule 12(c) SCRCP motion for judgment on the pleadings in the quiet title action. The circuit court considered facts outside the pleadings in denying Petitioners Rule 12(c) SCRCP motion. The circuit court considered affirmative defenses not plead by MERS – such as CitiMortgage and Bayview being necessary parties even though that argument was never plead by MERS; CitiMortgage and Bayview having an interest in the Note; and other arguments from Mr. Crotty on behalf of non-parties CitiMortgage and Bayview.

On April 27, 2011 Petitioners filed a Rule 59(e) SCRCP motion⁴ for rehearing which was denied by the circuit court on May 20, 2011. On May 23, 2011 Petitioners filed an amended notice of appeal.⁵

On June 8, 2011 respondents filed a motion to dismiss Petitioners' amended notice of

⁴ Appendix Exhibit 3

⁵ Appendix Exhibit 4

appeal.⁶ On June 23, 2011 Petitioners filed their opposition to the respondents' motion to dismiss the appeal.⁷ On June 29, 2011 respondents filed a motion to strike Petitioners return to the motion to dismiss as untimely.⁸ On July 1, 2011 Petitioner filed a petition to file their return out of time.⁹ On July 11, 2011 respondents filed its reply to Petitioners return to the motion to strike Petitioners' return as untimely.¹⁰

On September 13, 2011 the Court of Appeals granted Petitioners motion to file out of time; denied respondents motion to strike Petitioners return to the motion to dismiss as untimely;¹¹ and, granted respondents motion to dismiss the appeal. The Court of Appeals' order does not address the appealed Rule 12(c) SCRCF motion for judgment on the pleadings and default judgment against John Does 1-5,000 nor does the Court of appeals' order address the appealed circuit court's order striking Petitioners Rule 12(b)(8) and 13(a) SCRCF pleadings in the foreclosure action. The motion to dismiss the appeal was granted.

On September 28, 2011 Petitioners filed a petition for rehearing with the Court of Appeals.¹² On October 5, 2011 respondents filed its return to the petition for rehearing.¹³ On October 12, 2011 Petitioners filed their reply to the petition for rehearing.¹⁴ The Court of appeals denied the Petition for Rehearing on November 30, 2011.¹⁵ Petitioner now seeks a writ of certiorari to review this denial.

⁶ Appendix Exhibit 5

⁷ Appendix Exhibit 6

⁸ Appendix Exhibit 7

⁹ Appendix Exhibit 8

¹⁰ Appendix Exhibit 9

¹¹ Appendix Exhibit 10

¹² Appendix Exhibit 11

¹³ Appendix Exhibit 12

¹⁴ Appendix Exhibit 13

¹⁵ Appendix Exhibit 14

ARGUMENT

I. THE COURT OF APPEALS ERRED BY OVERLOOKING PETITIONER'S APPEAL OF THE CIRCUIT COURT'S ORDER DENYING PETITIONERS' RULE 12(c), 13(a) AND 12(b)(8) SCRCP MOTIONS IN BOTH THE ORDER GRANTING RESPONDENTS' MOTION TO DISMISS THE APPEAL AND THE ORDER DENYING THE PETITION FOR REHEARING.

The Court of Appeals overlooked Petitioners' amended notice of appeal of the circuit court's order denying Petitioners' Rule 12(c), 13(a) and 12(b)(8) SCRCP motions in both the September 13, 2011 order and the November 30, 2011-rehearing order. Nowhere in either order granting respondents motion to dismiss Petitioners' appeal does the Court of Appeals ever mention Petitioner's Rule 12(c), 13(a) and 12(b)(8) SCRCP motions.

Petitioners specifically appealed the circuit court's denial of their Rule 12(c), 13(a) and 12(b)(8) SCRCP motions in their opposition/return to respondents' motion to dismiss. Nowhere in the September 13, 2011 order does the court mention the Rule 12(c), 13(a) and 12(b)(8) SCRCP motions let alone address their applicability in a notice of appeal pursuant to SC Code Ann. §§ 14-3-330 (1) and 2(a) and 2(c). In their petition for rehearing, Petitioners specifically based their petition for rehearing on the fact that the Court of Appeals never addressed the circuit court's order denying their Rule 12(c), 13(a) and 12(b)(8) SCRCP motions let alone address their applicability to SC Code Ann. §§ 14-3-330 (1) and 2(a) and 2(c). Petitioners respectfully submit that the Court of Appeals erred in overlooking Petitioners' Rule 12(c), 13(a) and 12(b)(8) SCRCP motions and argue that the circuit court's order is immediately appealable as set forth below.

- A. THE CIRCUIT COURT'S ORDER DENYING PETITIONERS' RULE 12(c) SCRCP MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFAULT JUDGMENT IMPERMISSIBLY CONSIDERED FACTS OUTSIDE THE PLEADINGS INVOLVING THE MERITS PREVENTING A JUDGMENT FROM WHICH AN APPEAL MIGHT BE TAKEN AND IS IMMEDIATELY APPEALABLE UNDER SC CODE ANN. §§ 14-3-330 (1) AND 2(a).

The right of appeal is controlled by statute in South Carolina. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707, 708 (S.C. 2005). An appeal ordinarily may be pursued only after a party has obtained a final judgment. *Id.* citing *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (S.C. 1993); S.C. Code Ann. § 14-3-330 (1976); Rule 201(a), SCACR. If a judgment is not a final judgment an appellate court should look to the *effect* of an interlocutory order to determine its appealability under S.C. Code Ann. § 14-3-330. *Thornton v. South Carolina Elec. & Gas Corp.* 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011), (Emphasis added), citing *Bowden v. Powel*, 194 S.C. 482, 10 S.E.2d 8 (S.C. 1940), *Miles v. Charleston Light & Water Co.*, 87 S.C. 254, 69 S.E.2d 292 (S.C. 1910)..

Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (S.C. 2000) citing *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (S.C. 1985). "If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings." *Thornton supra*, at 479 (citing *Bowden supra* quoting *Harbert v. Atlanta & Charlotte Air-Line Ry. Co.*, 74 S.C. 13, 16, 53 S.E. 1001, 1001-02, (S.C. 1906)).

The Trial Court's denial of Petitioners' Rule 12(c) SCRCF motion for judgment on the pleadings and for default judgment involves the merits affecting Petitioners' substantial rights. Neither Respondent Bayview nor Respondent CitiMortgage had a valid recorded interest in Petitioners' property at the time the quiet title action was filed. Neither Respondent Bayview nor Respondent CitiMortgage was a party to the quiet title action. The Trial Court impermissibly considered facts not joined in the pleadings in dismissing the Rule 12(c) motion for judgment on the pleadings. As a result of the circuit court's consideration of respondents Bayview's and CitiMortgage's arguments as necessary parties, the circuit court's decision impermissibly involved the merits outside the pleadings and is immediately appealable under SC Code Ann. §§ 14-3-330 (1) and 2(a).

Moreover, the circuit court's order prevents a judgment from which an appeal might be taken. Even though the circuit court's order dismisses the quiet title action without prejudice, its *effect* is one of prejudice against Petitioner. The circuit court's order ignores the admission by respondent MERS that it assigned any interest it had in Petitioners' property after it was properly and timely served the Summons and Complaint in the quiet title action. The circuit court's order permits Petitioners to re-file their claims against MERS but as a result of multiple assignments since the quiet title action was originally filed, MERS may or may not be a proper party to make a quiet title claim against any longer. The circuit court's order did not preserve Petitioners chain of title at the time the original quiet title action was filed and therefore prevents a judgment from which an appeal might be taken.

If allowed to stand, the circuit court's order in effect permits respondent MERS to record a lien on property in this state yet avoid having to defend the validity and propriety of that lien by assigning its interest, if any, after it is properly and timely served with a summons and

complaint challenging such a MERS lien. The effect of the circuit court's order prevents a judgment from which an appeal might be taken and is immediately appealable SC Code Ann. §§ 14-3-330 (1) and 2(a).

B. THE CIRCUIT COURT'S RULE 12(b)(6) SCRCF DISMISSAL OF THE QUEIT TITLE ACTION INVOLVES THE MERITS AND STRIKES PETITIONERS' RULE 13 (a) AND 12(b)(8) SCRCF PRE-ANSWER PLEADINGS IN THE FORCLOSURE ACTION AND IS IMMEDIATELY APPEALABLE UNDER SC CODE ANN. §§ 14-3-330 (1) AND (2)(c).

In *Murphy v. Owens-Corning Fiberglas Corp.*, 346 S.C. 37, 550 S.E.2d 589 (Cl. App. 2001), overruled on other grounds by *Farmer v. Monsanto Corp.*, 353 S.C. 553, 556-57, 579 S.E.2d 325, 327 (2003), the court looked to the effect of an interlocutory order to determine its appealability under § 14-3-330(2)(c). *Murphy* at 44-45, 550 S.E.2d at 593. *Thornton supra*, at FN5. "Though the order granting the Rule 12(b)(1), SCRCF motion was not a final order, the Court found it immediately appealable because it had "the practical effect ... that it strikes out the Murphy's complaint with respect to [some but not all defendants]." *Murphy* at 44, 550 S.E.2d at 593.

"When an order may be appealable under § 14-3-330(2)(c) because it has the effect of striking out a pleading, the order is also appealable under § 14-3-330(1) as 'involving merits.'" *Link supra*, citing *Nauful v. Milligan*, 258 S.C. 139, 187 S.E.2d 511 (S.C. 1972); *Cf. Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (S.C. 1988) (an order "involves the merits" when it finally determines "some substantial matter forming the whole or a part of some cause of action or defense ..."). "A summary judgment ruling, as well as a 12(b)(6) dismissal, fits within this *Jefferson* definition. Section 14-3-330(1) allows a party to wait until final judgment to appeal intermediate orders 'necessarily affecting the judgment not before appealed from.' We have long ago held that

the phrase “necessarily affecting the judgment” has the equivalent meaning as the phrase “involving the merits,” and that the legislature meant to use these phrases interchangeably. *Link supra, citing Blakely & Copeland v. Frazier*, 11 S.C. 122 (S.C. 1878).

Here the Court of Appeals misapprehends the effect of the circuit court’s order dismissing the quiet title action pursuant to Rule 12(b)(6) SCRCP. The circuit court did not dismiss the quiet title action for failure to state a claim; rather, the circuit court states that its dismissal order is based “[i]n the interests of justice and judicial economy.”

The effect of the circuit court’s order is just the opposite. The effect of the dismissal of the quiet title action strikes Petitioners pleadings in the foreclosure action. The circuit court’s order at p. 10 dismisses Petitioners’ pre-answer pleadings in the foreclosure action stating: “. . . neither Bayview or CitiMortgage were properly made parties to the Quiet Title Action. Therefore, neither Rule 13(a) or 12(b)(8) are applicable, and the Junk’s [sic] Motion to Dismiss the Foreclosure Action on these grounds is hereby denied.” The circuit court never heard either motion in the foreclosure action before denying them and the Court of Appeals overlooked all three motions in its Order and denial of the petition for rehearing.

CONCLUSION

Based on the foregoing, the September 13, 2011 and the November 30, 2011 orders of the Court of Appeals should be overturned and Petitioners’ appeal of the issues presented should be immediately appealable under SC Code Ann. § 14-3-330 and its various subsections.

{Signature Page to Follow}

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

15/ A.P. Barnes Jr. / DLF

A. Parker Barnes, Jr.
Post Office Drawer 1729
500 Carteret Street
Beaufort, South Carolina 29901
(843) 522-2600
Counsel for Petitioner Christine Junk

D. L. Jurk

Daniel L. Jurk, J.D.
Pro Se Petitioner
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

Beaufort, South Carolina
December 30, 2011

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

Daniel L. Junk and Christine H.
Junk,

Petitioners,

v.

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

Respondents,

Case No. 2009-CP-07-04301

Bayview Loan Servicing, LLC,

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,

Petitioners.

Case No. 2009-CP-07-05088

CERTIFICATION

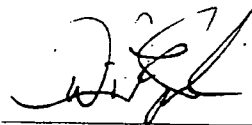
A. Parker Barnes, Jr.
Post Office Drawer 1729
500 Carteret Street
Beaufort, South Carolina 29901
(843) 522-2600
Counsel for Petitioner Christine Junk

Daniel L. Junk, J.D.
Pro Se Petitioner
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

Other Counsel of Record:

Brian P. Crotty
Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201
Counsel for Respondents Mortgage Electronic Registration Systems, Inc.;
Bayview Loan Servicing, LLC; and, CitiMortgage, Inc.
(803) 255-9422

I certify that a Petition for Rehearing was submitted to the Court of Appeals in this case on September 28, 2011 and that the Court of Appeals by decision dated November 30, 2011 denied the Petition for Rehearing in this case as a final judgment of the court.



Daniel L. Junk, J.D.
Pro Se Petitioner
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

Beaufort, South Carolina
December 30, 2011

Exhibit E

(02/22/12 Order)

INTRODUCTION

On September 14, 2011 and January 17, 2012, the Court held hearings on the following motions¹:

1. The Motion to Dismiss filed by Riley Pope & Laney, LLC, Heidi Carey, Esq., Roy Laney, Esq., and T. Lowndes Pope, Esq.;
2. The Motion to Dismiss, Strike, and/or Sever the Third-Party Complaint filed by Mortgage Electronic Registration Systems, Inc., MERSCORP, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., and Jennifer Oakes;
3. The Motion to Strike and/or Sever the Third-Party Complaint filed by CitiMortgage, Inc.;
4. The Motion to Dismiss, Strike, and/or Sever the Third-Party Complaint filed by Bayview Loan Servicing, LLC and Robert G. Hall;
5. The Motion to Dismiss filed by Corelogic, Inc.;
6. The Motion for Relief from the Entry of Default filed by Colonial Coast Title Agency, Inc.;
7. The Motion to Set Aside Entry of Default filed by Linda Heller and Harry Jones; and
8. The Motion to Join All Third-Party Defendants as Counterclaim Defendants filed by Daniel L. Junk and Christine H. Junk.

For the reasons set forth herein, the motions to dismiss the Third-Party Complaint are granted on both procedural and substantive grounds, the Junks' motion to join all Third-Party Defendants as counterclaim defendants is denied, and the motions for relief from default are granted.

FACTUAL BACKGROUND

This matter began as a simple foreclosure action filed against the Junks on October 26, 2009 by Bayview Loan Servicing, LLC ("Bayview").² The foreclosure action is based upon a

¹ A motion to set aside the entry of default filed by Third-Party Defendants Security Connections and Krystal Hall was also heard at the September 14, 2011 hearing and was granted by separate Order of this Court.

\$1,200,000.00 loan evidenced by a Note and Mortgage given by the Junks dated November 3, 2006. By Order of this Court filed April 12, 2011, CitiMortgage, Inc. ("CitiMortgage") was substituted as the Plaintiff in the foreclosure action. On June 16, 2011, the Junks filed their First Amended Answer, Counterclaims, and Third-Party Complaint.³ In addition to asserting various counterclaims against CitiMortgage, this pleading also included a Third-Party Complaint purporting to assert claims for (a) civil conspiracy; (b) slander of title; (c) legal professional negligence; and (d) quiet title against 23 named Third-Party Defendants.⁴ The following is a list of the Third-Party Defendants along with a summary of how they are alleged to have been involved with the mortgage loan that is the subject of the underlying foreclosure action:

- Riley Pope & Laney, LLC is the law firm that originally represented Bayview and that filed this foreclosure action;
- Heidi Carey, Esq., Roy Laney, Esq., and T. Lowndes Pope, Esq. are attorneys with Riley Pope & Laney, LLC who were involved in representing Bayview in this lawsuit;
- Bayview Loan Servicing, LLC was the original Plaintiff in this action and was the servicer of the Junks' loan and the assignee of the Mortgage at the time the foreclosure action was filed;
- Mortgage Electronic Registration Systems, Inc. ("MERS") was the Mortgagee, acting as the nominee for the lender and the Lender's successors and assigns, under the terms of the Junks' Mortgage;
- MERSCORP, Inc. is the parent corporation of MERS;

² Bayview was the servicer of the Junks' mortgage loan at the time the foreclosure action was filed.

³ The Junks' original Answer, Counterclaims and Third-Party Complaint was filed but never served on any party.

⁴ The third-party claim for legal professional negligence was asserted only against Riley Pope & Laney, LLC, Heidi Carey, Esq., Roy Laney, Esq., and T. Lowndes Pope, Esq. The third-party claim for slander of title was asserted against the foregoing parties and Bayview, MERS Jennifer Oakes, Robert G. Hall, SCI, Krystal Hall, Danielle Sterling, Colonial Coast, Lawyers Title, CoreLogic, and AMHI. The other two claims appear to have been asserted against all of the named Third-Party Defendants.

- CitiMaster Servicing is a division of CitiMortgage and is alleged to oversee servicing activities;
- Citigroup Global Markets Realty Corp. is alleged to be a party to the Master Loan Purchase and Servicing Agreement under which the Junks' loan was purchased by Citigroup from the original lender;
- Citigroup Mortgage Loan Trust, Inc. is alleged to be involved in the securitization of mortgage loans and is further alleged to have been a purchaser of the Junks' loan;
- Jennifer Oakes is an employee of CitiMortgage who previously submitted two affidavits in this matter;
- Robert G. Hall is an employee of Bayview who executed the mortgage assignment from MERS to Bayview, and the mortgage assignment from Bayview to CitiMortgage;
- Security Connections, Inc. ("SCI") is alleged to have recorded a mortgage satisfaction relating to a *prior* mortgage⁵ given by the Junks;
- Krystal Hall is alleged to be an employee of Security Connections, Inc. who executed the mortgage satisfaction relating to the *prior* mortgage given by the Junks;
- Danielle Sterling is alleged to be a former employee of the original lender (American Home Mortgage) whose name appears on the indorsement of the Note in this matter;
- ABC Appraisal Group, Inc. is alleged to have provided an appraisal of the property that is the subject of the Junks' mortgage loan;
- Mark A Ruplinger, Harry Jones, and Linda Heller are alleged to be employees of ABC Appraisal Group, Inc., who were involved in the Junks' appraisal;
- Colonial Coast Title Agency, Inc. ("Colonial Coast") is alleged to be the title insurance agency that issued a title insurance commitment relating to the mortgage loan that is the subject of this action;
- Lawyers Title Insurance Corporation ("Lawyers Title") is alleged to be the title insurance company that issued a title insurance policy relating to the mortgage loan that is the subject of this action;

⁵ The mortgage loan that is the subject of this action was made on November 3, 2006. The mortgage to which Security Connections is alleged to have been involved was given on September 26, 2005 and is a separate and distinct mortgage loan from the mortgage loan that is the subject of this foreclosure.

- CoreLogic, Inc. is alleged to provide mortgage processing services, settlement services, default solutions, and servicing and technology solutions to CitiMortgage, including printing and delivering draft affidavits; and
- American Home Mortgage Holdings, Inc. ("AMHI"), is alleged to have been the MERS member for which MERS was acting as nominee rather than American Home Mortgage.

ANALYSIS

I. THE JUNKS' THIRD-PARTY CLAIMS ARE PROCEDURALLY IMPROPER.

The Junk's Third-Party Complaint is an improper attempt to assert claims against the Third-Party Defendants that are not derivative of the Junk's liability to CitiMortgage.

A defendant may join other persons to an action as third-party defendants only in specific, limited circumstances. Rule 14(a), SCRPC, states that "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." "Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon *derivative liability*." *First Gen. Servs. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) (emphasis added). Thus, the liability of the third-party defendants must be *dependent* upon the original action such that "[t]he outcome of the principle claim must impact the third-party defendant's liability." *Id.* A prerequisite to the assertion of a third-party claim under Rule 14 is "a legal theory based on indemnification, contribution, express or implied warranty, subrogation, indemnity contract, or some other derivative liability theory that permits the defendant to shift some or all of his liability to the impleaded party. Impleader is improper without a substantive right to shift liability to the third-party defendant." JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 122 (3d ed. 2010).

5/8/16

11

Applied to this case, third-party practice is proper only if the Third-Party Defendants would be liable to the Junks for all or part of CitiMortgage's claims against the Junks. The foreclosure action centers upon the Junks' Note and Mortgage dated November 3, 2006. The Junks do not allege, and cannot plausibly allege, that any of the Third-Party Defendants are liable to pay the Junks' mortgage debt. Therefore, the outcome of CitiMortgage's claim for foreclosure of the Note and Mortgage does not, and in the circumstances of this case could not, in and of itself, create any liability by the Third-Party Defendants. The Junks' claims against the Third-Party Defendants are not based on any theory of derivative or secondary liability, such as indemnity or guaranty, and accordingly cannot be asserted as third-party claims. For these reasons, the Court grants the motions to dismiss the Third-Party Complaint in its entirety as procedurally improper.

II. THE JUNKS' THIRD-PARTY CLAIMS CANNOT BE ASSERTED AS COUNTERCLAIMS.

In an apparent attempt to avoid the procedural defects in their third-party claims, the Junks have moved to join all Third-Party Defendants as counterclaim defendants. Granting this motion would be equivalent to dismissing the Junks' third-party claims and then allowing them to re-join the Third-Party Defendants as counterclaim defendants for the purpose of asserting the third-party claims against them as counterclaims. For the reasons that follow, the Court concludes that the Junks should not be allowed to do so.

The Junks' joinder motion is based on Rules 13(h), 14(c), 19, and 20, SCRCp. Rule 13(h), SCRCp, states, "Parties other than those to the original action *may* be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20." (Emphasis added.) Rule 14(c) similarly provides that "the Court *may* order that a party designated as a third-party

6/24/06

1

defendant be joined as a plaintiff or defendant under Rules 19 or 20, *when the ends of justice and efficiency in proceedings would be served thereby....*" (Emphasis added.)

Significantly, both Rules 13(h) and 14(c) give the Court discretion in deciding joinder of parties. As stated by Professor Flanagan,

Impleader is always discretionary with the Court. . . . [T]he court must balance the desire to avoid circularity of action against the delay and prejudice that may occur to the existing parties. In particular the joinder of additional parties and claims may unduly complicate the original action and justify severing the impleaded claims and parties.

JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 124 (3d ed. 2010). Thus, neither Rule 13(h) nor Rule 14(c) *requires* joinder of additional parties or provides an independent method for exercising the court's discretion in considering joinder separate from the standards set forth in Rules 19 and 20.

A. The Third-Party Defendants are not "necessary" parties to this foreclosure action.

Rule 19, SCRPC, allows a person to be impleaded as a third-party in an action only if "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject matter of the action" Rule 19(a) SCRPC.

In this case, the Third-Party Defendants do not need to be joined as parties in order for CitiMortgage to obtain complete relief in the foreclosure action, nor are they required for the Junks to obtain complete relief under any of their defenses or counterclaims against CitiMortgage. Until the Junks began adding third-party defendants, this action was merely a typical residential mortgage foreclosure case. In such an action, the only necessary parties are persons who claim an interest in the note, persons who are liable for the debt secured by the mortgage, and persons who have or claim an interest in the real property encumbered by the

7 8/10

7

mortgage, either by holding title to the property or by claiming a lien on the property. None of the Third-Party Defendants are (or can claim to be) the current holder of the Note and Mortgage, and none claim (or are alleged to have) any obligation to pay the Note.

In their fourth cause of action to quiet title, the Junks allege, on information and belief, that the Third-Party Defendants claim or might claim an interest in the property adverse to the Junks. (Third-Party Complaint, p. 149, ¶ 337.) These unsupported allegations alone are not enough to establish that the Third-Party Defendants have an interest in the property. Rule 8(a)(2) of the South Carolina Rules of Civil Procedure is more demanding and requires that a pleading contain "a short and plain statement of the *facts* showing that the pleader is entitled to relief." (Emphasis added.) Similarly, the Junks have not alleged any *facts* in their claims for civil conspiracy, slander of title, and negligence supporting a plausible inference that any of the Third-Party Defendants could claim or might claim an interest in the Junks' property. Given the lack of factual allegations, and especially since this is simply a mortgage foreclosure action, there is no basis to conclude that, in the absence of the Third-Party Defendants, complete relief cannot be accorded among those already parties.

Moreover, the fact that the Junks may contend that some or all of the Third-Party Defendants are joint tortfeasors with CitiMortgage does not render them "necessary" parties under Rule 19(a)(1). A joint tortfeasor is not required to be joined because the existing defendant is jointly and severally liable and accords the plaintiff complete relief. *South Carolina Dep't of Health & Envtl. Control v. Fed-Serv Indus., Inc.*, 294 S.C. 33, 362 S.E.2d 311 (Ct. App. 1987).

The requirements of Rule 19(a)(2) are also not satisfied in this case, because, as demonstrated above, none of the Third-Party Defendants claim any interest relating to the subject matter of the action, that is, the Note, the Mortgage, and the mortgaged property.

In sum, the conclusory allegations in the Junks' Third-Party claims are insufficient to establish that the Third-Party Defendants are necessary parties to this action or have an interest in the subject property or this mortgage foreclosure action sufficient to warrant joinder under Rule 19(a)(1) or (2).

B. There is no appropriate basis for permissive joinder of the Third-Party Defendants.

Rule 20(a), SCRCP, states, "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."

Here, CitiMortgage's claims against the Junks arise out of the mortgage loan dated November 3, 2006, and the Junks' failure to pay the sums owed when due. The Junks' claims against the Third-Party Defendants arise out of a later civil action, commenced on October 26, 2009, to foreclose the mortgage securing the Junks' debt. The claims that the Junks desire to assert are independent claims, arising out of a completely separate transaction or occurrence than CitiMortgage's claims; and nothing would be gained by adding parties to this action for the sole purpose of adjudicating the Junks' claims. On the contrary, adding parties for that purpose would be confusing and inefficient and would serve only to complicate and further delay the foreclosure action that has already been significantly delayed.

5/16

7

For the foregoing reasons, the Junks' motion to join all Third-Party Defendants as counterclaim defendants is denied on procedural grounds.

III. THE JUNKS' THIRD-PARTY CLAIMS FAIL AS A MATTER OF LAW.

A. The Junks' claim for civil conspiracy is an improper attempt to assert a claim for malicious prosecution of a civil action that is still pending.

Although the Junks have labeled their first third-party claim as a cause of action for civil conspiracy, it is substantively a claim for malicious prosecution. The elements of a cause of action for malicious prosecution are (1) institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant; (3) termination of such proceedings in his favor; (4) malice in instituting the proceedings; (5) lack of probable cause; and (6) resulting injury or damage. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 441, 629 S.E.2d 642, 651 (2006); *McBride v. Sch. Dist.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010).

In their first third-party claim, the Junks expressly or implicitly allege five of the six elements of a cause of action for malicious prosecution, except, of course, termination of the proceedings in their favor. Specifically, the Junks allege that this claim arises from "the filing of a malicious and knowingly fraudulent foreclosure action against the Junks." (Junks' Answer, etc. p. 90, ¶ 211.) They further allege that as a result of the "numerous malicious and knowingly false and fraudulent pleadings," they have suffered "money damages, special damages, statutory damages, and punitive damages." (*Id.* ¶¶ 212-13.) The Junks are thus clearly alleging that CitiMortgage's foreclosure action against them has been maliciously prosecuted and that they have been damaged by such prosecution.

10 of 16

The labels the Junks have applied to their third-party claims are not determinative of the legal nature of those claims. Rule 8(f), SCRPC, states, "All pleadings shall be so construed as to do substantial justice to all parties." This rule requires that a court review an entire pleading and probe the substance of its allegations to determine the true nature of a claim alleged. See *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009) ("Our courts have held that it is the substance of the requested relief that matters regardless of the form in which the request for relief was framed.") (internal citations omitted); *Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007) ("In construing a complaint or a responsive pleading, the court must review the entire pleading."); accord *General Dynamics Corp. v. United States*, 139 F.3d 1280, 1283 (9th Cir. 1998) (holding that a court should not accept labels of claims to ascertain the nature of a cause of action).

In probing the substance of the claims in this case, the Court finds that the claim for civil conspiracy is really a claim for malicious prosecution. Construed as a claim for malicious prosecution, the Junks' first third-party claim fails as a matter of law, because the action the Junks allege is being maliciously prosecuted has not been terminated in their favor.⁶ As noted above, a key requirement for a claim of malicious prosecution is that it cannot be asserted unless and until the prosecution on which the claim is based has been terminated in favor of the person asserting the claim. *Law*, 368 S.C. at 435, 629 S.E.2d. at 648.

For this reason, the Junks' claim for civil conspiracy is dismissed, and it cannot be re-asserted as a counterclaim.

⁶ For this reason, the Court's April 11, 2011 Order dismissing the Junks' originally filed quiet title complaint has not prejudiced the Junks. If the Third-Party Defendants have information that may be relevant to the claims and defenses of the foreclosure action, then that information may be sought by the Junks through normal Third-Party discovery available under the South Carolina Rules of Civil Procedure.

B. The Junks' claim for slander of title fails because it is based on the filing of documents that are absolutely privileged.

The Junks allege that certain Third-Party Defendants have "slandered the Junks' title to their property in Beaufort County in filing and recording false and malicious documents . . . falsely and maliciously publicizing that the Junks' property is allegedly in foreclosure" (Junks' Answer, etc. p. 130, ¶ 306.) In support of this claim, the Junks refer to notices of lis pendens filed by certain Third-Party Defendants. (*Id.* at 132-33, ¶¶307(e) and (g).) The Junks further allege that certain Third-Party Defendants filed in this court "a joint motion to substitute Plaintiff with a supporting affidavit from Jennifer Oakes." (*Id.* at 134, ¶ 307(j).) Finally, the Junks allege that the same Third-Party Defendants filed the supplemental affidavit of Jennifer Oakes in support of the motion. (*Id.* ¶ 307(k).) These allegations will not support a claim for slander of title.

The filing of a notice of lis pendens filed in conjunction with an action involving the same real estate is absolutely privileged in South Carolina and cannot form the basis of an action for slander of title. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 32, 567 S.E.2d 881, 897 (Ct. App. 2002). Similarly, "defamatory matter contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, is absolutely privileged." *Redfearn v. Pusser*, 276 S.C. 506, 506-07, 280 S.E.2d 206, ____ (1981).

The documents on which the Junks base their third-party claim for slander of title are absolutely privileged and will not support the claim. The notice of lis pendens was filed in conjunction with the foreclosure action involving the same property. The motion to substitute Plaintiff and the supporting affidavits were all filed according to law and contained information relevant and pertinent to the issues in the case. The Court finds that these filings were proper

and cannot for the basis of an action for slander of title. The Junks' second third-party claim is therefore dismissed, and it cannot be re-asserted as a counterclaim.

C. The Junks' claim for professional negligence fails as a matter of law.

The Junks' third-party claim for professional negligence is against Third-Party Defendants Riley Pope & Laney, LLC, Heidi Carey, Roy Laney, and T. Lowndes Pope (the "RPL Parties").⁷ This third-party claim alleges that in the course of representing Third-Party Defendants Bayview Loan Servicing, LLC and Mortgage Electronic Registration Systems, Inc. in a mortgage foreclosure action against the Junks, the RPL Parties breached duties owed to the Junks. (Junks' Answer, etc. pp. 135-48, ¶¶ 314-31.) The Junks' claim for professional negligence lacks merit as a matter of law.

"An attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Gaar v. North Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986). Litigation is typically conducted in an attorney's professional capacity and not in, or for, his own personal interest. *Id.* at 529, 339 S.E.2d at 889. "In his professional capacity the attorney is not liable . . . for injury allegedly arising out of the performance of his professional activities." *Id.*

An attorney-client relationship did not exist between the RPL Parties and the Junks at any time relevant to this action, and consequently no duty was owed to the Junks. Nor did the Third-Party Complaint allege that such a duty was breached by the RPL Parties. Indeed, none of the South Carolina Rules of Professional Conduct cited in the Third-Party Complaint (i.e., 1.1, 3.1,

⁷ The Junks also brought a claim against the RPL Parties for Sanctions for Fraud Upon the Court, Filed November 24, 2010, that was dismissed by this court during a hearing which took place on April 9, 2011.

3.3, 4.1, 5.1, 5.2, and 11)⁸ establish an independent duty owed to the Junks by the RPL Parties. For these reasons, the Junks' third-party claim of legal professional negligence is dismissed, and it cannot be re-asserted as a counterclaim.

D. The Junks' claim to quiet title to their property fails to state a claim for relief.

As previously discussed, the claim to quiet title fails to allege facts supporting a plausible inference that any of the Third-Party Defendants claim or might claim an interest in the Junks' property, and it is thus not sufficient to state a claim for relief against the Third-Party Defendants.

IV. THE MOTIONS FOR RELIEF FROM THE ENTRY OF DEFAULT ARE GRANTED.

Third-Party Defendants Linda Heller, Harry Jones, and Colonial Coast have each filed motions to set aside the entry of default. The Court grants the motions.

A court may set aside an entry of default for "good cause shown." Rule 55(c), SCRPC. The standard for relief from the entry of default under Rule 55(c) is less rigorous than the standard for relief from a default judgment under Rule 60(b). *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009); *see also Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 306, 460 S.E.2d 427, 429 (Ct. App. 1995) (explaining that under Rule 55(c), courts exercise a "a broader, more liberal discretion than otherwise would be exercised under Rule 60(b)"). To demonstrate "good cause," a party must "provide an explanation for the default and give reasons why vacation of the default entry would serve the

⁸ The same rules are also cited in the Affidavit of attorney Thomas A. Pendarvis, which was attached to the Third-Party Complaint to support the professional negligence claim. The court respectfully disagrees with Mr. Pendarvis' interpretation of these rules as they relate to this set of facts.

interests of justice.” *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. “Once a party has put forth a satisfactory explanation for the default, the trial court must also consider (1) the timing of the 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.* at 607-08, 681 S.E.2d at 888. “A motion under Rule 55(c) is addressed to the sound discretion of the trial court.” *Id.* at 608, 681 S.E.2d at 888.

Based on the written materials submitted in this case, including affidavits, as well as the arguments of counsel at the hearing, the Court finds that Linda Heller, Harry Jones, and Colonial Coast have each established “good cause” for relief from the entry of default. Additionally, the moving parties acted promptly in filing the motions for relief and each has set forth meritorious defenses. Moreover, the Junks are unable to show how they are prejudiced if relief from the entry of default is granted. Mr. Junk admitted at the hearing that there was no prejudice as to Heller and Jones, and he was unable to establish any prejudice aside from the minimal delay resulting from Colonial Coast being granted relief from default. “Prejudice is not significant unless it is something greater than would be experienced by the ordinary litigant in being required to litigate on the merits. Some delay will necessarily result when a default is reopened, but delay in gaining judgment is not considered by itself, to be undue prejudice that would justify denying relief.” 10 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 55.70 [2][c] (3d. ed. 2010).

For these reasons, as well as those stated in the motions, memoranda, supporting affidavits, and at the hearing, the Court grants the motions to set aside the entry of default.⁹

⁹ At the hearing held on January 17, 2012, Mr. Junk requested that this Court “certify” the ruling granting Colonial Coast’s motion for relief from the entry of default pursuant to Rule 54(b), SCRCP. This request is now moot given that the Third-Party Complaint has been dismissed.

Nonetheless, because the Court has ruled that the Third-Party Complaint should be dismissed as to all Third-Party Defendants, as explained above, the default issue is now moot.

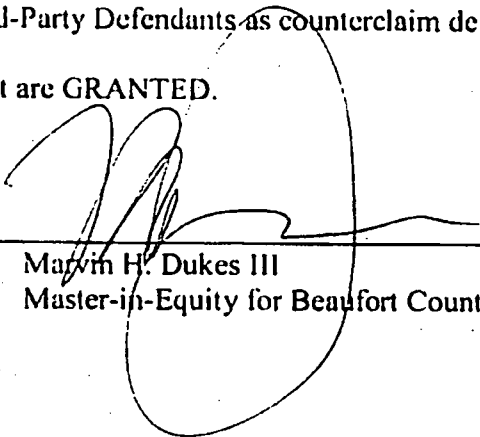
V. THE FORECLOSURE ACTION IS NOT AFFECTED BY THE DISMISSAL OF THE THIRD-PARTY COMPLAINT AND MAY PROCEED.

As the Court has previously found, the third-party claims are independent claims arising out of a separate transaction or occurrence from the Note and Mortgage which are the subject of the Plaintiff's foreclosure action. Because CitiMortgage's foreclosure claim and the third-party claims are not related and do not affect one another, the foreclosure action shall proceed with the hearings previously scheduled for Thursday, February 23, 2012 at 10:00 a.m., notwithstanding any possible appeal of this order.

CONCLUSION

FOR THE FOREGOING REASONS, the motions to dismiss the Third-Party Complaint are GRANTED, the Junks' motion to join all Third-Party Defendants as counterclaim defendants is DENIED, and the motions for relief from default are GRANTED.

AND IT IS SO ORDERED.



Marvin H. Dukes III
Master-in-Equity for Beaufort County

Beaufort, South Carolina
Wednesday, February 22, 2012

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for CitiMortgage, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

ORDER: GRANTING MOTIONS TO DISMISS THIRD-PARTY COMPLAINT, DENYING MOTION TO JOIN ALL THIRD-PARTY DEFENDANTS AS COUNTERCLAIM DEFENDANTS, AND GRANTING MOTIONS FOR RELIEF FROM DEFAULT

Parties Served:

A. Parker Barnes, Jr., Esquire
P.O. Drawer 1729
Beaufort, SC 29901-1729

Daniel L. Junk (via certified mail)
c/o Brunner Quinn
35 North Fourth Street
Columbus, OH 43215

Andrew E. Colvin, Esquire
Nexsen Pruet, LLC
P.O. Box 23256
Hilton Head Island, SC 29925

James Y. Becker, Esquire
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29221-1889

John T. Lay, Esquire
Gallivan White & Boyd, P.A.
P.O. Box 7368
Columbia, SC 29202

27 PM 8-22

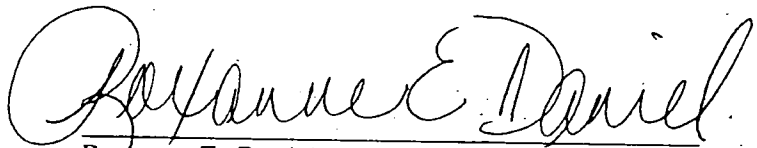
Sean Michael Bolchoz, Esquire
Hale & Bolchoz, LLC
1533 Fording Island Road, Suite 294
P.O. Box 22561
Hilton Head Island, SC 29925

Demetri "Jim" K. Koutrakos, Esquire
Callison Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202

Elizabeth Van Doren Gray, Esquire
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Susan Taylor Wall, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401

Maria E. Kiehling, Esquire
Buist, Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464



Roxanne E. Daniel
Administrative Assistant

Feb. 23, 2012

Exhibit F

(03/23/12 Notice of Appeal)

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.

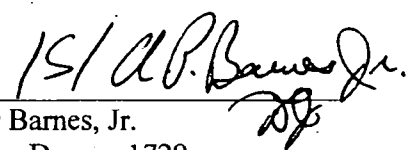
Riley Pope & Laney, LLC , Heidi Carey, Esq.,
Roy Laney, Esq., T. Lowndes Pope, Esq.,
Bayview Loan Servicing, LLC, MERSCORP, Inc.,
Mortgage Electronic Registration Systems, Inc.,
Citi Master Servicing, Citigroup Global Markets
Realty Corp., Citigroup Mortgage Loan Trust, Inc.,
John Does 1-5,000, Jennifer 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.

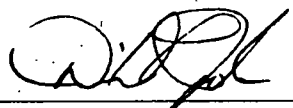
Third-party Respondents.

NOTICE OF APPEAL

Daniel L. Junk and Christine H. Junk appeal the order of the Honorable Marvin Dukes, III, dated February 22, 2012 that, among other issues, finally decided Appellants' Quiet Title action, Case No. 2009-CP-07-04301 which is currently pending Writ of Certiorari review in the South Carolina Supreme Court. Appellant was served written notice of entry of this order via United States Mail on February 23, 2012.

March 23, 2012


A. Parker Barnes, Jr.
Post Office Drawer 1729
500 Carteret Street
Beaufort, South Carolina 29901
(843) 522-2600
Counsel for Appellant, Counterclaim
Appellant and Third-party Appellant
Christine Junk


Daniel L. Junk, J.D.
Pro Se Appellant, Counterclaim
Appellant and Third-party Appellant
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

Other Counsel of Record:

Brian P. Crotty, Esquire
Nelson Mullins Riley & Scarborough LLP
1320 Main Street
Columbia, SC 29201
Attorney for Respondent and Counterclaim Respondent CitiMortgage, Inc. and Third-party Respondents Bayview Loan Servicing, LLC, MERSCORP, Inc., Mortgage Electronic Registration Systems, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., Jennifer Oakes and Robert G. Hall

Andrew E. Colvin, Esquire
Nexsen Pruet, LLC
P.O. Box 23256
Hilton Head Island, SC 29925
Attorney for Defendant Oldfield Community Association

James Y. Becker, Esquire
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29221-1889
Attorney for Third-party Respondent Corelogic, Inc.

John T. Lay, Esquire
Gallivan White & Boyd, P.A.
P.O. Box 7368
Columbia, SC 29202
Attorney for Third-party Respondents Riley Pope & Laney, LLC, Heidy Carey, Esq., Roy Laney, Esq., and T. Lowndes Pope, Esq.

Sean Michael Bolchoz, Esquire
Hale & Bolchoz, LLC
1533 Fording Island Road, Suite 294
P.O. Box 22561
Hilton Head Island, SC 29925
Attorney for Third-party Respondent Security Connections, Inc. and Krystal Hall

Demetri "Jim" K. Koutrakos, Esquire
Callison Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202
Attorney for Third-party Respondent Lawyers Title Insurance Corporation

Elizabeth Van Doren Gray, Esquire
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449

Columbia, SC 29211

Attorney for Third-party Respondent Colonial Coast Title Agency, Inc.

Susan Taylor Wall, Esquire

McNair Law Firm. P.A.

Post Office Box 1431

Charleston, South Carolina 29402

Attorney for Third-party Respondents ABC Appraisal Group, Mark A. Ruplinger, Linda Heller
and Harry Jones

Maria E. Kiehling, Esquire

Buist, Byars & Taylor, LLC

652 Coleman Blvd., Suite 200

Mt. Pleasant, SC 29464

Attorney for Third-party Respondent Danielle Sterling

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.

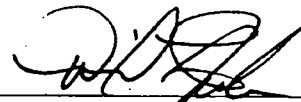
Riley Pope & Laney, LLC, Heidi Carey, Esq.,
Roy Laney, Esq., T. Lowndes Pope, Esq.,
Bayview Loan Servicing, LLC, MERSCORP, Inc.,
Mortgage Electronic Registration Systems, Inc.,
Citi Master Servicing, Citigroup Global Markets
Realty Corp., Citigroup Mortgage Loan Trust, Inc.,
John Does 1-5,000, Jennifer 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.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on CitiMortgage, Inc., Oldfield Community Association, 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., 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 and Corelogic, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on March 23, 2012, addressed to the attorney of record for each party respectively, as listed below.

March 23, 2012



Daniel L. Junk, J.D.
Pro Se Appellant, Counterclaim
Appellant and Third-party Appellant
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

Other Counsel of Record:

Brian P. Crotty, Esquire
Nelson Mullins Riley & Scarborough LLP
1320 Main Street
Columbia, SC 29201

Attorney for Respondent and Counterclaim Respondent CitiMortgage, Inc. and Third-party Respondents Bayview Loan Servicing, LLC, MERSCORP, Inc., Mortgage Electronic Registration Systems, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., Jennifer Oakes and Robert G. Hall

Andrew E. Colvin, Esquire
Nexsen Pruet, LLC
P.O. Box 23256
Hilton Head Island, SC 29925
Attorney for Defendant Oldfield Community Association

James Y. Becker, Esquire
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29221-1889
Attorney for Third-party Respondent Corelogic, Inc.

John T. Lay, Esquire
Gallivan White & Boyd, P.A.
P.O. Box 7368
Columbia, SC 29202
Attorney for Third-party Respondents Riley Pope & Laney, LLC, Heidi Carey, Esq., Roy Laney, Esq., and T. Lowndes Pope, Esq.

Sean Michael Bolchoz, Esquire
Hale & Bolchoz, LLC
1533 Fording Island Road, Suite 294
P.O. Box 22561
Hilton Head Island, SC 29925
Attorney for Third-party Respondent Security Connections, Inc. and Krystal Hall

Demetri "Jim" K. Koutrakos, Esquire
Callison Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202
Attorney for Third-party Respondent Lawyers Title Insurance Corporation

Elizabeth Van Doren Gray, Esquire
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211
Attorney for Third-party Respondent Colonial Coast Title Agency, Inc.

Susan Taylor Wall, Esquire
McNair Law Firm, P.A.
Post Office Box 1431

Charleston, South Carolina 29402

Attorney for Third-party Respondents ABC Appraisal Group, Mark A. Ruplinger, Linda Heller
and Harry Jones

Maria E. Kiehling, Esquire

Buist, Byars & Taylor, LLC

652 Coleman Blvd., Suite 200

Mt. Pleasant, SC 29464

Attorney for Third-party Respondent Danielle Sterling

Exhibit G

**(04/06/10 Brief in Support of
Motion to Dismiss)**

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) CIVIL ACTION NO.: 2009-CP-07-05088

BAYVIEW LOAN SERVICING, LLC, a)
Delaware Limited Liability Company,)

Plaintiffs,)

v.)

DANIEL L. JUNK AND CHRISTINE H.)
JUNK, et al.,)

Defendants.)

PLAINTIFFS' BRIEF IN
SUPPORT OF THEIR MOTION TO
DISMISS PURSUANT TO
SCRCP 12(B)(6)

2010 APR -6 PM 4:50
JENNIFER SCOTT MOISE
BEAUFORT COUNTY, S.C.
CLERK OF COURT

TO: ELIZABETH SCOTT MOISE, COUNSEL FOR MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. (MERS):

MEMORANDUM IN SUPPORT OF MOTION

I. Introduction.

This action was filed to foreclose on a certain purported mortgage on real estate. *See Exhibit A* Complaint at ¶ 1. The alleged plaintiff in this action is "Bayview Loan Servicing, LLC a Delaware Limited Liability Company." The alleged plaintiff does not have standing to bring this action. Plaintiff is not the holder of the purported note because the note, which is attached to *Exhibit A* Complaint as Exhibit A, does not have the necessary indicia of indorsement on it for plaintiff to claim it is the holder of the note.

The document purporting to be the mortgage, which is attached to *Exhibit A* Complaint as Exhibit B, is not a valid mortgage under South Carolina law. The purported original mortgagee, Mortgage Electronic Registration Systems, Inc. ("MERS"), never has had a pecuniary interest in the debt subject the purported loan transaction; the mortgage was never intended to be delivered

or negotiated to MERS nor ever was delivered or negotiated to MERS by the mortgagors; and, the purpose for which the mortgage was executed would not have served any purpose if the papers had not been recorded, rendering the mortgage null and void under South Carolina law.

Moreover, the assignment from MERS upon which plaintiff relies for standing in this action is void as a matter of law. The assignment of the mortgage to plaintiff, which is attached to the *Exhibit A* Complaint as Exhibit C, is invalid because it was not probated in accordance with *S.C. Code Ann. §30-7-50* prior to recording. Further, the assignor, MERS, states in the document that it is a purported assignment of the *note* and mortgage when in fact MERS never was or has been the holder or owner of the note or the debt evidenced thereby and is judicially estopped from claiming otherwise and cannot assign the note therefor.

MERS cites its role in the assignment to plaintiff as that of nominee for "American Home Mortgage." MERS is contractually prohibited from exercising any rights with respect to the mortgages (i.e., assignment or foreclosure) without the authorization of its members. "American Home Mortgage" has been under the protection of the U.S. Trustee in the U.S. Bankruptcy Court in Delaware since August 6, 2007. As a result, "American Home Mortgage" is precluded by law from giving its nominee permission to assign a note and mortgage, and plaintiff has given no indication in its filings or pleadings that it ever was given permission in this case to do so, rendering the assignment nugatory since it was without the note and without instruction from MERS' recorded principal, "American Home Mortgage."

Plaintiff's claim to be the holder and owner of the purported note and purported mortgage through the invalid assignment from MERS is baseless and without legal merit. Moreover, since its filing of this action against defendants, plaintiff has since purportedly assigned the note and mortgage to CitiMortgage, Inc. dated March 17, 2010 and recorded it in the Beaufort County

Register of Deeds Office on March 19, 2010. *See Exhibit B.* That assignment is also invalid as a matter of law because it is based on the preceding invalid assignment from MERS to Bayview and further because it does not have a probate witness listed whatsoever as required by *S.C. Code Ann. §30-7-50*.

Finally, MERS' nominee interest (if any) was extinguished when "American Home Mortgage" sold the note multiple times before it was paid off to "American home Mortgage" on February 1, 2007 without any subsequent recording of MERS' new principal. *See Exhibit C AHM transaction history.* The only publicly recorded interest in plaintiffs' property provides notice that "American Home Mortgage" is the lender and, herefore, MERS's principal. MERS assignment to plaintiffs is signed as though it is acting on its own without "American Home Mortgage" being its principal, yet no other lender recorded its interest as an assignee of "American Home Mortgage."

Plaintiff's claim of standing based on the invalid assignment from MERS is baseless and without legal merit. As a result of the invalid assignment, along with the fact the plaintiff is not the holder of the note; and, plaintiff had no legal interest in the purported note and mortgage at the time the Complaint was filed, plaintiff is not the real party in interest and has no standing to invoke the jurisdiction of this Court. Plaintiff's Complaint should be dismissed therefor.

II. Law & Argument.

A. The alleged plaintiff fails to state a claim for which relief can be granted.

A SCRCP 12(b)(6) 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 plaintiff's 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 v. Onorato*, 457 S.E.2d 601, 602 (1995). 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 v. Ham*, 357 S.E.2d 8 (1987). See also *Kennedy v. Henderson*, 346 S.E.2d 526 (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.*, 153 S.E.2d 184 (1967).

Rule 17(a) of the South Carolina Rules of Civil Procedure states, “[e]very action shall be prosecuted in the name of the real party in interest.” Standing refers to a “[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.” *Black's Law Dictionary* 1413 (7th ed.1999). “Standing is ... that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims.” 1A C.J.S. *Actions* § 101 (2005). It concerns an individual's “sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court.” *Id.*

Standing is comprised of three elements:

First, the plaintiff must have suffered an “injury in fact” an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’ ” Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be “fairly ... trace[able] to

the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Smiley v. South Carolina Dep't of Health & Env'tl Control, 649 S.E.2d 31, 32-33 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, (1992) (alteration in original)). “The party seeking to establish standing carries the burden of demonstrating each of the three elements.” *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. South Carolina Dep't of Natural Res.*, 550 S.E.2d 287, 291 (2001). “As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation.” *Ex parte Morris*, 624 S.E.2d 649, 652 (2006). “One must be a real party in interest, *i.e.*, a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” *Id.*

This law has been followed in many cases involving MERS and /or some of its members wherein numerous courts have held that the foreclosing MERS member lacked standing and was not the real party in interest and dismissed the cases. See *Mortgage Electronic Registration Systems, Inc. v. Leonard F. Girdvanis, Jr., et al.*, 2005-CP-43-0278, Sumter County, South Carolina, Court of Common Pleas for the Thirteenth Judicial Circuit; see also *Mortgage Elec. Registration Sys., Inc. v. Estrella*, 390 F.3d 522, 524-25 (7th Cir. 2004); see also *Mortgage Elec. Registration Sys., Inc. v. S.W. Homes of Ark.*, ___ S.W.3d ___, 2009 WL 723182 (Ark. Mar. 19, 2009) (slip op. at 4-5); see also *Landmark Nat'l Bank v. Kesler*, 192 P.3d 177, 179 (Kan. App. 2008), review granted (Kan. Feb. 11,

2009); see also *Landmark Nat'l Bank v. Kesler*, 2009 Kan. LEXIS 834 (Aug 28, 2009); see also *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo.App.2009).

1. Plaintiff is not the holder of the note and lacks standing to state a claim therefor. For promissory notes, which are negotiable instruments, the real party in interest is the holder; with the holder identified as the party in possession of the instrument with the instrument having the proper indorsement thereon. See S.C. Code Ann. §§ 36-3-201, 202. (a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder. (b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone. *Id.*, at 202.

In South Carolina a mortgage is an instrument that creates a lien on a particular piece of land as collateral for the repayment of the mortgagor's debt to the mortgagee. By definition a mortgage cannot exist without an underlying debt or obligation for which the mortgage stands as collateral. 27 S.C. Jur. Mortgages § 2, citing 1791 S.C. Acts 1496, 5 Stat. at Large (1791); *Bartles v. Livingston*, 319 S. E. 2d 707 (Ct. App. 1984). The Act of 1791 provided that henceforth "the mortgagor shall be still deemed owner of the land, and the mortgagee as owner of the money lent or due, and shall be entitled to recover satisfaction for the same out of the land" Section II, Act No. 1496, 5 Stat. at Large 170 (1791). *Bartles*

at pg. 712, *see also* SC Code of Laws § 29-3-10. Although an alleged mortgage is recorded and that fact raises a prima facie case, this cannot stand up when the circumstances are inconsistent with such presumption as established by testimony. *Williams v. Lawrence*, et al., 8 S.E. 2d 838, 842, citing *Burke v. Burke*, 139 S.E. 209.

A mortgage, like any other deed to be valid and operative, must not only be duly executed but must be delivered by the mortgagor and accepted by the mortgagee or someone legally acting for him and without delivery it cannot take effect as a transfer of title or as a security. *Id.* *See also* S.C. Code Ann. 36-3-202. *See also*, *South Carolina Nat. Bank v. Halter* 359 S.E.2d 74. (1987) "There was neither legal transfer of notes under § 36-3-202, nor perfection of security interest in notes under § 36-9-304, where notes had never been assigned from decedent to wife and were thus property of estate of decedent, because assignment of mortgage as distinct from debt it secures is nugatory and confers no rights upon transferee absent some indication that parties also intended to transfer debt; there was no intent, based on record, that decedent intended to assign notes to wife to secure mortgage where record showed that decedent was aware that assignment of mortgage should also be accompanied by assignment of notes; most telling indication of decedent's intention was fact that he did not give possession of notes to wife."

Delivery rests not in words written, but in things done and said. 8 S.E. 2d 838 *Supra*, citing *Shute v. Shute*, 64 S.E. 145. If the purpose for which a mortgage is executed would not have served any purpose if the papers had not

been recorded, the mortgage is null and void. *Id.* The purported mortgage, *Exhibit A* Complaint, as *Exhibit B*, pg. 3, states that MERS takes title as mortgagee solely as nominee for "Lender and Lender's successors and assigns," solely as nominee. MERS has no pecuniary interest in the purported mortgage itself and but for the purported mortgage being recorded has no legal or equitable lien on defendants' property beyond that (if any) of its recorded principal. The mortgage document states that the mortgage protects the lender, not the mortgagee and the MERS business rules state that the Title Insurance Policy covers the lender and not the mortgagee. Therefore the purpose for which the purported mortgage was executed does not serve any purpose had the papers not been recorded, rendering the mortgage null and void as a matter of South Carolina law.

Here, the alleged plaintiff is neither the holder of the note nor the holder of the mortgage and any transfer not in writing is invalid pursuant to the Statute of Frauds. The note produced by the alleged plaintiff is in the name of "American Home Mortgage." *Exhibit A* Complaint, as *Exhibit A*. The alleged plaintiff is "Bayview Loan Servicing, LLC a Delaware Limited Liability Company." Nowhere on the note produced is the necessary indorsement from "American Home Mortgage" to "Bayview Loan Servicing, LLC a Delaware Limited Liability Company." In fact, the note appears to be indorsed to "Citimortgage" and not plaintiff. Therefore, although the alleged plaintiff claims to be in possession of the note, it is not the holder by law and is not the real party in interest.

The purported note was separated from the purported mortgage at inception by design. MERS and its members intentionally created a separation of the obligation from the mortgage resulting in a practical loss of efficacy of the mortgage. *See Exhibit D.* MERS and its member, "American Home Mortgage," the purported lender, intentionally split the debt obligation and the purported security interest at inception. As a result, the purported mortgage does not secure the note and the close connectedness doctrine prevents plaintiff from claiming it took the purported assignment of the note and mortgage in good faith as assignee. *Mortgage Electronic Registration Systems, Inc. v Leonard F. Girdvanis, Jr., et al.*, 2005-CP-43-0278, Sumter County, South Carolina, Court of Common Pleas for the Thirteenth Judicial Circuit, *citing Midfirst Bank v. C.W. Haynes & Company, Inc.*, 893 F.Supp 1304 (1994); *see also* RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES §5.4 (a), cmt. B (1997).

Further, the mortgage was never negotiated or delivered to MERS as mortgagee. The mortgage has instructions on it to return it to "American Home Mortgage" after recording. Additionally, MERS' counsel at the closing did in fact return the mortgage after recording to "American Home Mortgage" and not MERS. *See Exhibit E.* Therefore, the mortgage was never delivered to the mortgagee and is ineffective as a security instrument under South Carolina law. As such, the plaintiff is not the holder of the note and the mortgage is not a valid mortgage under South Carolina law. Therefore the Complaint must be dismissed for lack of standing and failure to state a claim for which relief may be granted.

2. The assignment produced by the alleged plaintiff is invalid. In South Carolina, assignments of mortgages without the mortgage must be probated in the same manner as a mortgage. *S.C. Code Ann. §30-7-50*. For mortgages, the real party in interest is the party in whose name the mortgage has been properly assigned, if at all, as reflected by the records of the county recorder's office. *See S.C. Code Ann. §§ 30-7-10, 30-7-40, and 30-7-50*. Further, transfers of interests in real estate must be in writing pursuant to the Statute of Frauds. *See S.C. Code Ann. §§ 32-3-10 and 32-3-20*.

The assignment upon which plaintiffs claim ownership of the purported note and mortgage is not properly probated. Further, the subsequent assignment recorded on March 19, 2010 from plaintiff to CitiMortgage also is invalid for being not properly probated. In the assignment dated September 25, 2009 from MERS to Plaintiffs, the jurat states that the notary witnessed the assignor's signature and not but there was no probate of a signing witness, which is improper under the statute. Nowhere on the document is there a proper notarized attestation by the signing probate witness that she saw Robert G. Hall execute the assignment. Further, in the assignment from Bayview to CitiMortgage, there is no probate witness whatsoever, clearly in violation of South Carolina statute.

Moreover, the assignor, MERS, states in the assignment that it is the nominee for "American Home Mortgage" yet assigns it purportedly as mortgagee on its own and not as nominee for "American Home Mortgage". However, "MERS is *contractually prohibited from exercising any rights with respect to the mortgages (i.e., assignment or foreclosure) without the authorization of the*

members. *Mortgage Electronic Registrations Sys., Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W. 2d 784, 787 (Neb. 2005) (emphasis added).

The court may take judicial notice of the fact that “American Home Mortgage” is in bankruptcy through its filing of a Suggestion of Bankruptcy in response to being served the Summons and Complaint in an action for Quiet Title no. 2009-CP-07-04301 filed by defendants Daniel L Junk and Christine H. Junk on September 11, 2009. *See Exhibit E*.

The assignment attached to the Complaint fails to assign the mortgage to the alleged plaintiff. It is not properly probated and the signatory for MERS on the assignment attached to the Complaint is an employee and officer of plaintiff Bayview Loan Servicing, LLC a Delaware Limited Liability Company. Although it appears as though Mr. Hall is an officer of MERS, plaintiff is precluded from claiming it is an assignee that took the assignment in good faith as a result of Mr. Hall being a Vice President of Bayview. In other words, plaintiff assigned the mortgage to itself under the guise of being a corporate officer of MERS without the required formalities of South Carolina statute. *See MERS v. Girdvanis, Supra*.

Further, the mortgage produced by the alleged plaintiff is in the name of “Mortgage Electronic Registration Systems, Inc.” as nominee for “American Home Mortgage . . . a Corporation organized and existing under the laws of New York.” *See Exhibit A Complaint, Exhibit B*. The assignment is from “Mortgage Electronic Registration Systems, Inc. to “Bayview Loan Servicing LLC a Delaware Limited Liability Company.” *See Exhibit A Complaint, Exhibit C*.

Nowhere on the note, mortgage or the assignment, nor attached to the Complaint, is there any indication that MERS was authorized to act on its own in purportedly assigning the note and mortgage.

"American Home Mortgage" is in bankruptcy and legally prohibited from issuing any instructions to MERS to assign the note and mortgage without approval from the U.S. Trustee or Bankruptcy Judge presiding over its case in Delaware. MERS is contractually prohibited from exercising any rights to the mortgages without the authorization of its principal or member for which it contractually claims to be acting solely as nominee. Nowhere on the note, mortgage, or assignment is there any indication that MERS was assigning the note and mortgage pursuant to its recorded principal's instructions. Therefore, as a result of the bankruptcy stay, the failure of standing cannot be cured within a reasonable amount of time and the Complaint must be dismissed for lack of standing and failure to state a claim for which relief may be granted.

B. The alleged plaintiff has failed to invoke the jurisdiction of this Court.

A court may dismiss for lack of jurisdiction over the subject matter if the plaintiff has not alleged any cause of action which the court has authority to decide. *Richmond, Fredericksburg & Potomac R. Co. v. U.S.*, 945 F.2d 765 (4th Cir.1991). There are two separate types of motions to dismiss for lack of subject matter jurisdiction: the "facial attack" and the "factual attack." 61A Am. Jur. 2d Pleading § 558 (2010). The facial attack is addressed to the sufficiency of the allegations of the complaint itself. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980), reh'g denied, 622 F.2d 1043 (5th Cir. 1980) and cert. denied, 449 U.S. 953, (1980). On such a motion, the court is merely

required to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, *Id.*, and the factual allegations of the complaint are taken as true. *Brown v. Bronstein*, 389 F. Supp. 1328 (S.D.N.Y. 1975); *Mortensen v. First Federal Sav. and Loan Ass'n*, 549 F.2d 884 (3d Cir. 1977), on remand to, 79 F.R.D. 603 (D.N.J. 1978).

In resolving a motion to dismiss for lack of factual basis for subject matter jurisdiction, the court should apply the standard applicable to motion for summary judgment, under which nonmoving party must set forth specific facts beyond pleadings to show that genuine issue of material fact exists. 945 F.2d 765 (4th Cir.1991) *Supra*. Party moving for dismissal for lack of subject matter jurisdiction should prevail only if material jurisdictional facts are not in dispute and moving party is entitled to prevail as matter of law. *Ridenour v. Andrews Federal Credit Union*, 897 F.2d 715 (4th Cir. 1990).

Here, the alleged plaintiff has not set forth any cause of action which the Court has authority to decide. As discussed above, the alleged plaintiff is not the real party in interest and does not have standing to bring this action. Without the proper parties before it, this Court lacks authority to adjudicate the alleged plaintiff's claims. Therefore, this action should be dismissed for lack of jurisdiction.

Where a defendant declares that the court lacks personal jurisdiction, the burden is on the plaintiff to establish the court's jurisdiction. 945 F.2d 765 (4th Cir.1991) *Supra*. The court may examine the claims contained in the pleadings, affidavits, depositions, and interrogatories, and may take oral testimony. *Id.*

Here, this Court lacks personal jurisdiction over defendants because the Complaint and Summons served on defendants are invalid. As discussed above, the

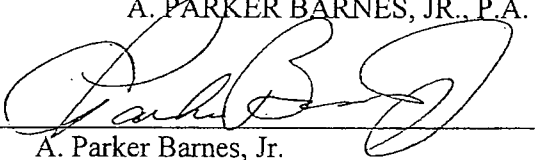
alleged plaintiff lacks standing and is not the real party in interest. Therefore, this action should be dismissed for lack of jurisdiction.

III. Conclusion

For the foregoing reasons, the alleged plaintiff lacks standing, has failed to state a claim for which relief may be granted, has failed to invoke the jurisdiction of this Court and the claims are barred by the Statute of Frauds, *S.C. Code Ann. §§ 32-3-10 and 32-3-20*, such that the Complaint should be dismissed.

Respectfully Submitted,

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

BY: 

A. Parker Barnes, Jr.
Post Office Drawer 1729
500 Carteret Street
Beaufort, South Carolina 29901
(843) 522-2600
Attorney for Daniel L. Junk and Christine H.
Junk

Beaufort, South Carolina

April 6, 2010

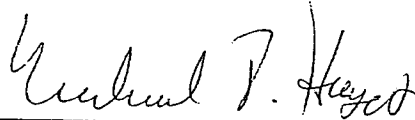
Michael D. Hayes
VARGA BERGER LEDSKY HAYES & CASEY
224 South Michigan Avenue, Suite 350
Chicago, IL 60604
(312) 341-9400 (telephone)
(312) 341-2900 (facsimile)

CERTIFICATE OF SERVICE

Michael D. Hayes, an attorney, hereby certifies that a true and correct copy of the foregoing,
Suggestion of Bankruptcy, was served upon:

A. Parker Barnes, Jr.
P.O. Drawer 1729
Beaufort, South Carolina 29901

by placing same in the United States mail chute located at 224 South Michigan Avenue, Chicago,
Illinois 60604, properly addressed and postage fully prepaid, this 24th day of September, 2009, on or
before the hour of 5:00 p.m.



Michael D. Hayes

Exhibit H

**(6/23/11 Return to Motion to
Dismiss)**

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

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-07-04301

Bayview Loan Servicing, LLC,

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.

Case No. 2009-CP-07-05088

Opposition to Motion to Dismiss

In response to Respondent's Motion to Dismiss pursuant to Rule 240(a) of the South Carolina Appellate Court Rules filed with this Court on June 8, 2011 Appellants submit this brief in opposition to Respondents' Motion to Dismiss. The effect of the orders appealed

from render each ruling immediately appealable as either a final judgment or by statute under SC Code Ann. § 14-3-330 and its various subsections. Respondents' motion to dismiss the instant appeals should be denied.

The orders being appealed relate to two separate but closely related actions. (April 11, 2011 Order p. 10) (Exhibit 1). The first action is Civil Action No. 2009-CP-07-04301 ("the quiet title action") filed on September 11, 2009 by Appellants against American Home Mortgage,¹ Mortgage Electronic Registration Systems, Inc. ("MERS") and John Does 1-5,000 for all unknown Defendants. The second action is Civil Action No. 2009-CP-07-05088 ("the foreclosure action") filed by Respondent Bayview Loan Servicing, LLC ("Bayview") on October 27, 2009 as the owner and holder of Appellants' purported mortgage and refinance promissory note ("Refi Note") that was filed *after* the Appellants' quiet title action was filed against Respondent MERS. As a result of a purported assignment of the Refi Note and purported mortgage recorded on March 19, 2010 *after* the foreclosure action was filed by Bayview, and the April 11, 2011 Order granting Respondents Rule 25(c) SCRCPP motion under Rule 17(a) SCRCPP, Respondent CitiMortgage, Inc. ("CitiMortgage") has now been substituted for Bayview in the foreclosure action as the Plaintiff.

The appealed orders issue rulings on a total of six motions, with three motions pertaining to the quiet title action and three motions pertaining to the foreclosure action. *Id.* pp. 1-2. Specifically, in the quiet title action, the appealed orders addressed:

- 1) Appellants' Motion for MERS to Post an Indemnity Bond for a Lost Instrument;
- 2) Appellants' Rule 12(c) SCRCPP Motion for Judgment on the Pleadings and

¹ American Home Mortgage Corp. as opposed to American Home Mortgage filed a Suggestion of Bankruptcy in lieu of an Answer and Appellants non-suited American Home Mortgage without prejudice. (April 11, 2011 Order p. 7 FN 2).

Default Judgment; and

3) MERS's Rule 12(b)(6) SCRPC Motion to Dismiss the Quiet Title Action.

In the foreclosure action, the appealed orders addressed:

- A. Appellants' Rule 12(b)(6) SCRPC Motion to Dismiss Bayview's Foreclosure Action;
- B. Appellants' Motion to Dismiss under Rules 12(b)(8) as Same Parties to the Quiet Title Action and 13(a) SCRPC for Compulsory Counterclaims to the Quiet Title Action; and
- C. Bayview's and CitiMortgage's Joint Rule 25(c) SCRPC Motion to Substitute CitiMortgage as Plaintiff and to Substitute Counsel for Substitute Plaintiff.

The appeal of the Orders dated April 11, 2011 ("April Order") and May 20, 2011 ("May Order") (Exhibit 2) and entered by the Beaufort County Clerk ("Clerk") on April 12, and May 20, 2011, respectively, disposed of the quiet title action in its entirety without leave to amend even though Appellant requested leave (Transcript of Hearing on February 10, 2011 ("Feb. Transcript") (Exhibit 3) p. 75;14, and was a final judgment dismissing the quiet title action. April Order pp. 13-14, *see also* May Order. Respondents' motion to dismiss the quiet title action that was granted was also a motion for summary judgment in the alternative. While the April Order states the dismissal is without prejudice, its effect is one of prejudice to the Appellants. *Id.*

There has been no formal discovery in the quiet title action, yet the April Order denied Appellants' leave to amend their Complaint to correct any deficiencies in the pleadings. *Id.* The Trial Court Order requires Appellants to refile their quiet title action claims in their answer to the foreclosure action. The foreclosure action arose from the same closing as the quiet title action but involves subsequent parties that acquired an interest in Appellants' property *after* the quiet title action was filed. *Id.* p. 10. *See also* Feb. Transcript

pp. 103;20-25:104;1-21:109;6-15.

There has been no formal discovery in either the quiet title action or the foreclosure action. All of the findings in the Trial Court's April Order are based on contested, inadmissible hearsay without any foundation. None of the Trial Court's rulings are based on sworn testimony properly before the Trial Court.

Appellants' have not had the opportunity to depose any of the affiants of the three affidavits submitted by Respondents in either of the actions. Appellants have not had the opportunity to depose Krystal Hall, an alleged "robo-signer" who claimed to be a Vice President of Respondent MERS and who attested under oath that Appellants' 2005 Note constituting a first purchase money mortgage debt had been discharged per the terms of the refinance contract and that the purported mortgage for that debt was cancelled despite the fact that she is not an employee of MERS.

In fact, the Trial Court has not even so much as formally taken judicial notice of any of the documents relied on its April Order or the May Order. The orders are based upon Respondent MERS' Lost Mortgage Satisfaction; Respondent Bayview's second Lis Pendens; MERS' purported assignment of Appellants' Refi Note and purported mortgage to Respondent Bayview; and, Respondent Bayview's purported assignment of Appellants' purported mortgage and Refi Note to Respondent CitiMortgage. None of these documents have been admitted into evidence with any foundation, authentication or testimony and *all but the Lost Mortgage Satisfaction were executed or recorded after the quiet title action was filed.*

In effect the Orders determine the quiet title action as originally filed, involving the merits affecting substantial rights of Appellants and striking Appellants' pleadings and

defenses to the foreclosure action. *Id.* at pp. 7-14. The April Order requires Appellants to bring their original quiet title action claims in a subsequently filed separate action as counterclaims and third-party claims against a party that had no valid recorded interest in the Appellants' property either at the time the quiet title was filed or when the foreclosure action was originally filed. *Id.* at 13-14.²

On May 12, 2011 Appellants filed their Notice of Appeal as to the April order. On May 20, 2011 the Trial Court denied Appellants' Rule 59(e) SCRCP Motion to Alter or Amend the Judgment and on May 23, 2011 Appellants filed an Amended Notice of Appeal to include the Trial Court's May Order. Appellants are appealing all six rulings contained in the April and May Orders. Even if the rulings in the April and May Orders are not deemed "final" each ruling in the Orders is a permissible appeal under S.C. Code Ann. § 14-3-330 and its various subsections as set forth more fully below.

The right of appeal is controlled by statute in South Carolina. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707, 708 (S.C. 2005). An appeal ordinarily may be pursued only after a party has obtained a final judgment. *Id.* citing *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (S.C. 1993); S.C. Code Ann. § 14-3-330 (1976); Rule 201(a), SCACR. If a judgment is not a final judgment an appellate court should look to the effect of an interlocutory order to determine its appealability under S.C. Code Ann. § 14-3-330. *Thornton v. South Carolina Elec. & Gas Corp.* 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011) citing *Bowden v. Powel*, 194 S.C. 482, 10 S.E.2d 8 (S.C. 1940), *Miles v. Charleston Light & Water Co.*, 87 S.C. 254, 69 S.E.2d 292

² The Quiet Title Action was filed on September 11, 2009; the Foreclosure Action was filed October 27, 2009; and the Motion to Substitute Plaintiff was filed Jointly by Bayview and CitiMortgage on March 30, 2010.

(S.C. 1910).

SC Code Ann. § 14-3-330 authorizes appeals from:

- 1) “any intermediate order involving the merits and necessarily affecting the judgment;” and
- 2) (a) “of an order affecting a substantial right made in an action when such order in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action;”

(b) “grants or refuses a new trial;” or

(c) “strikes out an answer or any part thereof or any pleading in any action.”³

If an order falls into one of the subsections set forth within that statute the order is immediately appealable. *Hagood supra*.

Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E2d 11, 13 (S.C. 2000) citing *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (S.C. 1985). “If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings.” *Thornton supra*, at 479 (citing *Bowden supra* quoting *Harbert v. Atlanta & Charlotte Air Line Ry. Co.*, 74 S.C. 13, 16, 53 S.E. 1001, 1001–02, (S.C 1906)). This Court heard an appeal from an order striking two defenses from an answer in *P.J. Construction Co., Inc. v. Roller*, 287 S.C. 632, 340 S.E.2d 564, (Ct. App. 1986). Before proceeding to the

³ Respondents’ Brief at p. 3 cites the same statute but without explanation fails to cite to this Honorable Court subsection 2(b) or (c) which allows an immediate appeal under the statute of an order that strikes out an answer or any part thereof or any pleading in any action.

merits of the appeal, the Court stated: “[a]n order striking a portion of a pleading is immediately appealable.” *Id.*

An order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading. *Leibovitz v. Mudd*, 289 S.C. 476, 478, 347 S.E. 2d 94, 96 (S.C. 1986) citing *Miles supra*, (order granting demurrer as to portion of complaint). “When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” Rule 54(b) SCRPC.

Lack of certification under Rule 54(b) SCRPC does not bar an immediate appeal since an appellant has a statutory right to immediately appeal. *Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176, 178 (S.C. 1990). This is the same conclusion reached by the federal courts under their Rule 54(b). 10 Wright, Miller & Kane, *Federal Practice and Procedure, Civil 2d*, § 2658 at pp. 71-72 (1983) (Rule 54(b) should not be construed to alter federal appellate jurisdiction or supersede or modify the other means by which a party can secure a review of a trial court determination). *Link* at 4-5.

In *Murphy v. Owens-Corning Fiberglas Corp.*, 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), *overruled on other grounds by Farmer v. Monsanto Corp.*, 353 S.C. 553, 556-57, 579 S.E.2d 325, 327 (2003), this Court looked to the effect of an interlocutory order to determine its appealability under § 14-3-330(2)(c). *Murphy* at 44-45, 550 S.E.2d at 593. *Thornton supra*, at FN5. “Though the order granting the Rule 12(b)(1), SCRPC motion was

not a final order, the Court found it immediately appealable because it had “the practical effect ... that it strikes out the Murphy’s complaint with respect to [some but not all defendants].” *Murphy* at 44, 550 S.E.2d at 593.

“When an order may be appealable under § 14-3-330(2)(c) because it has the effect of striking out a pleading, the order is also appealable under § 14-3-330(1) as ‘involving merits.’” *Link supra*, citing *Nauful v. Milligan*, 258 S.C. 139, 187 S.E.2d 511 (S.C. 1972); *Cf. Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (S.C. 1988) (an order “involves the merits” when it finally determines “some substantial matter forming the whole or a part of some cause of action or defense ...”). “A summary judgment ruling, as well as a 12(b)(6) dismissal, fits within this *Jefferson* definition. Section 14-3-330(1) allows a party to wait until final judgment to appeal intermediate orders ‘necessarily affecting the judgment not before appealed from.’ We have long ago held that the phrase “necessarily affecting the judgment” has the equivalent meaning as the phrase “involving the merits,” and that the legislature meant to use these phrases interchangeably. *Link supra*, citing *Blakely & Copeland v. Frazier*, 11 S.C. 122 (S.C. 1878).

I. ALL OF THE TRIAL COURT’S RULINGS RELATED TO THE QUIET TITLE ACTION IN THE APRIL 11, 2011 AND MAY 20, 2011 ORDERS ARE IMMEDIATELY APPEALABLE.

A. DENIAL OF APPELLANTS’ MOTION FOR MERS TO POST A BOND FOR A LOST INSTRUMENT IN THE QUIET TITLE ACTION INVOLVES THE MERITS AFFECTING A SUBSTANTIAL RIGHT OF APPELLANTS AND STRIKES A DEFENSE OF APPELLANTS IN THE FORECLOSURE ACTION.

The Trial Court denied Appellants’ motion to require Respondent MERS to post an indemnity bond for a lost instrument. April Order pp. 7-8, see also May Order. Appellants’ motion was based on their claim that paying off their original promissory note dated September 26, 2005 (“2005 Note”) to the holder in due course was a condition precedent to

the Refi Note transaction. (See Plaintiffs' Brief in Support of Their Motion Requiring Defendant Mortgage Electronic Registration Systems, Inc. to Post an Indemnity Bond for a Lost Instrument ("Pltfs. Bond Brief"), p.1, (Exhibit 4), *see also* Feb. Transcript pp. 24;7-12, *see also* Appellants' Notice of Motion to Alter or Amend the April 11, 2011 Order Pursuant to Rule 59(e) SCRPC ("Rule 59(e) Motion") p. 18, ¶ C, (Exhibit 5). The Trial Court mistakenly and illogically stated that "[t]he Junks' motion seeking to have MERS's [sic] post an indemnity bond, however, relates not to the November 3, 2006 Mortgage, but instead to a prior mortgage dated September 26, 2005 (that was to be paid off as part of the November 3, 2006 mortgage loan transaction)." April Order p. 7, (emphasis in original), *see also* Feb. Transcript, pp. 22;5-32;18, *see also* Rule 59(e) Motion 18, ¶ C(1) and (2).

Appellants claimed in the Trial Court that MERS had recorded a fraudulent lost mortgage satisfaction of their 2005 Note and purported mortgage Pltfs. Bond Brief p. 2, *see also* Feb. Transcript, pp. 31;11 *see also* Rule 59(e) Motion 18, ¶ C(5)(i-vii) and that the condition precedent had not been met putting the Appellants at risk of double liability on the 2005 Note. Pltfs. Bond Brief p. 3, *see also* Feb. Transcript, pp. 28;3-10: 31;11, *see also* Rule 59(e) Motion p. 20, ¶C(3). Appellants' claim was under S.C. Code Ann. § 36-3-601(b). Pltfs. Bond Brief p. 3-4. Appellants are still liable for the entire amount of the 2005 Note to a holder in due course who acquired holder in due course status without notice of the discharge. Pltfs. Bond Brief *Id.*, *see also*, Feb. Transcript, p. 26;11-16. Appellants additionally claimed that they have a cloud on their title as a result of MERS' fraudulent Lost Mortgage Satisfaction. *Id.* at 4, *see also*, Feb. Transcript, p. 31;22-23, *see also* Rule 59(e) Motion p. 20 ¶ 6(i).

Contract law is based on the principle expressed in the Latin phrase *pacta sunt*

servanda, which is usually translated "agreements to be kept." It is a general legal principle that an intentional misrepresentation is so substantial and fundamental as to defeat the purpose of the contract. *Rogers v. Silsbury Brick Corp.*, 299 S.C. 141, 143-144, 382 S.E.2d 915, (S.C. 1989) citing *Elliott v. Snyder*, 246 S.C. 186, 191, 143 S.E.2d 374, 375, (S.C. 1965). Failure to pay off and satisfy the original loan per the required terms of the refinance loan leaves the mortgagor at risk to unanticipated and unbargained for risk. *In Re Roy*, 387 S.C. 372, 692 S.E.2d 916, (S.C. 2010). "[I]mproper handling [of the] refinance exposed both [the mortgagor and] title insurance company to significant risk as the refinance lien was unprotected and in a secondary position...." *Id.*

The U.S. Supreme Court held – over a century ago – that a "mortgage can have no separate existence" from its promissory note. *Carpenter v. Longan*, 83 U.S. 271, 274 (1872). MERS' claim to own legal title to mortgages, despite the promissory notes those purported mortgages purportedly secure having been negotiated elsewhere, flies in the face of the legal maxim endorsed by the U.S. Supreme Court: *accessorium non ducit, sequitur principalem* – the accessory does not lead, but rather follows the principal. *Id.* at 276. A valid mortgage joined with a promissory note is inseparable because of the "dependent and incidental relation" that a valid mortgage has with the obligation it secures. *Id.*

"South Carolina recognizes the 'familiar and uncontroverted proposition' that 'the assignment of a note secured by a [valid] mortgage carries with it an assignment of the mortgage.'" *Midfirst Bank. SSB v. C.W. Haynes & Co., Inc.*, 893 F.Supp, 1304, 1318, (D.S.C. 1004), citing *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (S.C. 1930); *Ballou v. Young*, 42 S.C. 170, 20 S.E. 84 (S.C. 1894). "The assignment of a [valid or invalid] mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee...." *Id.*

quoting *South Carolina Nat'l Bank v. Halter*, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct.App.1987) (citing *Hahn*, 157 S.C. 157, 154 S.E. 112).

Under S.C. Code Ann. § 36-3-601(b) discharge of a promissory note debt obligation is effective against a holder in due course only if the holder had notice of the discharge when holder in due course status was acquired. This Court held that “a fraudulent satisfaction [of a valid mortgage] will not prevent a mortgagee from foreclosing a mortgage.” *MI CO., LTD., v. Arthur F. McLean, Jr., Trustee under Testamentary Trust contained in the Will of Sarah S. McLean*, 325 S.C. 616, 482 S.E.2d 597, 624, (Ct. App. 1997) citing *Pilkington v. McBain*, 274 S.C. 312, 262 S.E.2d 916, (S.C. 1980).

Appellants face an unanticipated and unbargained for substantial risk that a subsequent creditor could appear to enforce the 2005 Note and purported mortgage that is “lost” through an action for equitable subrogation. Because the Refi Note and purported mortgage subject of both the quiet title action and foreclosure action are the result of a voluntary refinancing with the same “Lender,” AHM, the Refi Note and any valid security associated with it would be second in priority to the 2005 Note and its purported mortgage. *Matrix Financial Services Corp., v Frazer*, --- S.E.2d --- , 2010 WL 3219472, (S.C. 2010) “[a] party must have liability for the debt other than a voluntary agreement to refinance its own earlier [valid] mortgage; otherwise, a lender can simply refinance the debt at any time to prevail over an intervening lien holder, rendering the requirement of secondary liability meaningless.”

MERS cannot discharge Appellants’ 2005 Note debt by either agreement or the laws of this state because its only interest in the 2005 Note transaction is an interest in land solely for recording purposes. (April 11, 2011 Order p. 4). See also, *Bank of New York v.*

Silverberg, --- N.Y.S.2d ---, 2011 WL 2279723 (N.Y.A.D. 2 Dept.) (“For purposes of recording . . . MERS is the mortgagee of record. However, as “nominee,” MERS’s authority was limited to only those powers which were specifically conferred to it and authorized by the lender (see Black’s Law Dictionary 1076 [8th ed 2004] [defining a nominee as “(a) person designated to act in place of another, (usually) in a very limited way”]). Hence . . . [the purported mortgage] did not specifically give MERS the right to [discharge] the underlying notes, and the [discharge] of the notes was thus beyond MERS’s authority as nominee or agent of the lender[.]). See also, *Mortgage Electronic Registration Systems, Inc. v Nebraska Department of Banking and Finance*, 270 Neb. 529, 535, 536, 704 N.W.2d 784, 788 (Neb. 2005) (“... MERS does not acquire ‘any loan or extension of credit secured by a lien on real property.’ MERS does not itself extend credit or acquire rights to receive payments on mortgage loans. Rather, the lenders retain the promissory notes and servicing rights to the mortgage, while MERS acquires legal title to the mortgage for recordation purposes.”)

The September 26, 2005 purported mortgage *only* gave MERS authority to discharge the security instrument and *not* the 2005 Note. April Order p.4, see also Feb. Transcript p. 22;19-25. Because a joined valid mortgage can have no separate existence from its promissory note and the accessory does not lead, but rather follows the principal, discharge of a valid security instrument is of no legal effect as to discharge of the debt.

Respondent MERS never has had the right, per the terms of the purported mortgage or law, to discharge the debt as the purported mortgagee for recoding purposes only. *Id.*; *Carpenter*, 83 U.S. 271, 274, 276; *Midfirst Bank*, 893 F.Supp, 1304; *Bank of New York*, 2011 WL 2279723, *Mortgage Electronic Registration Systems, Inc.* 704 N.W.2d 784, 788.

Respondent MERS has never had an interest in the 2005 Note or the debt evidenced thereby and the Lost Mortgage Satisfaction that was recorded is of no effect to a holder in due course of the 2005 Note that acquired holder in due course status without notice of the discharge. S.C. Code Ann. § 36-3-601(b).

“[No] recent South Carolina case law addressing the effect of a fraudulent satisfaction on an innocent third party who subsequently takes an interest in the [validly] mortgaged property [exists]. However, in the 1884 case of *City Council of Charleston v. Ryan*, 22 S.C. 339, (1885), the court held, where the mortgagee endorsed his name in blank on the back of the mortgage and a satisfaction was thereafter written above his signature, *the mortgagee must bear the consequences of the act* made possible through his negligence, and an innocent subsequent purchaser would be protected.” *MI CO., LTD, supra*. [Emphasis added.] The Trial Court’s assumption that the purported MERS mortgage for the 2005 Refi Note was extinguished on record April Order p. 8, *see also*, Feb. Transcript p. 32;6-9) is very much mistaken. (“[S]ince that loan was apparently paid off . . . [t]he Junks’ motion to require MERS to post a bond relating to the 2005 Mortgage is without any basis or support.”) April Order p. 8. [Emphasis added].

Respondent MERS’ Lost Mortgage Satisfaction has no probative weight or legal significance and Appellants’ title to their property must therefore be considered the same as a wild deed. Chain of title is not a mere technicality – it is the bedrock of South Carolina property law where if you buy a property you should receive clear title to it.

The fact that no holder in due course has attempted to collect on the 2005 Note does not mean Appellants do not have damages to sustain their motion. *Id.* “[A]ctions constituting wilful [sic] invasion of a plaintiff’s legal rights will give rise to damages

sufficient to sustain an action, even though those damages are presumed[.]” *Pilkington*, 274 S.C. 312, 262 S.E.2d 916, (S.C. 1980), *citing Hinson v. A. T. Sistare Construction Co.*, 236 S.C. 125, 113 S.E.2d 341, (S.C. 1960) *overruled on other grounds; Cook v. Atlantic Coast Line R. Co.*, 183 S.C. 279, 190 S.E. 923, (S.C. 1937).”

The Trial Court’s denial of Appellants’ motion for MERS to post a bond for a lost instrument involves the quiet title action merits affecting substantial rights of Appellants striking a defense claim of setoff that Appellants could assert in their answer to the foreclosure action. Appellants’ appeal of the April and May Orders of the Trial Court denying the motion to post a bond for a lost instrument is therefore immediately appealable under SC Code Ann. §§ 14-3-330(1) and (2)(a) and (c).

B. THE TRIAL COURT CONSIDERED FACTS NOT JOINED IN THE PLEADINGS IN DENYING APPELLANTS’ MOTION FOR JUDGMENT ON THE PLEADINGS UNDER RULE 12(C) SCRPC AGAINST DEFENDANT MERS AND FOR DEFAULT JUDGMENT AGAINST DEFENDANTS JOHN DOES 1-5,000 AND IS IMMEDIATELY APPEALABLE UNDER SC CODE ANN. §§ 14-3-330(1) AND (2)(a).

The Trial Court’s denial of Appellants’ Rule 12(c) SCRPC motion for judgment on the pleadings and for default judgment involves the merits affecting Appellants’ substantial rights. April Order pp. 8-9, *see also* May Order, *see also*, Rule 59(e) Motion p. 17, ¶ B. Neither Respondent Bayview nor Respondent CitiMortgage had a valid recorded interest in Appellants’ property at the time the quiet title action was filed. Neither Respondent Bayview nor Respondent CitiMortgage was a party to the quiet title action. Rule 59(e) Motion p. 17, ¶ B(3). The Trial Court impermissibly considered facts not joined in the pleadings in dismissing the Rule 12(c) motion for judgment on the pleadings. *Id.*, *see also*, Feb. Transcript p. 19;2-25;p.20;1-5, *see also* May Order, *see also* Rule 59(e) Motion p. 17, ¶ B(6).

“Being in the nature of a demurrer, a motion for judgment on the pleadings raises an issue

of law only.” *Page v. North Carolina Mut. Life Ins. Co.*, 207 S.C. 277, 35 S.E.2d 716, (S.C. 1945). “If there is joined an issue of fact upon which, if supported by the evidence, a valid judgment may be based, a judgment on the pleadings is improper. The court cannot anticipate what the proof will show. *American Surety Co. v. Mills*, 194 S.C. 221, 9 S.E.2d 433, (S.C. 1940).” “A motion for Judgment on the Pleadings is proper where pleadings entitle a party to judgment without proof, by disclosure of all facts, where the pleadings present no issue of fact or present merely an immaterial issue.” *Rosenthal v. Unarco Industries, Inc.*, 278 S.C. 420, 297 S.E.2d 638, (S.C. 1982), citing *Wooten v. Standard Life and Casualty Insurance Company*, 239 S.C. 243 (S.C. 1961).

Appellants’ motion for judgment on the pleadings and default judgment is based on the law. There are no issues of fact that have been joined outside the pleadings of the quiet title action upon which, if supported by the evidence; a valid judgment may be based. MERS as nominee for AHM was the only recorded interest in the Junks’ property at the time the quiet title action was filed. Respondent MERS in its Answer claims it assigned the purported mortgage to Respondent Bayview eight (8) days after personal service was effected upon MERS in the quiet title action. MERS Answer p. 2 ¶ 12 (Exhibit 6). Neither Respondents Bayview or CitiMortgage ever made an appearance in the quiet title action despite the purported assignment from MERS after MERS had been served in the quiet title action.

In ¶ 17 of MERS Answer (*Id.*) Respondent MERS admits the allegations contained in ¶ 33 of the quiet title action Amended Complaint. See Quiet Title Amended Complaint p. 7, ¶ 33 (Exhibit 7). MERS admits it has no right title or interest in the Junks Refi Lien or Refi Note or property as a result of its assignment as agent to its principal Bayview. MERS Answer *supra*.

The Trial Court further erred by allowing non-parties Bayview and CitiMortgage to argue

an affirmative defense that was not pled by Respondent MERS in its Answer to the quiet title action Amended Complaint. Feb. Transcript p. 118;17-22, see also Rule 59(e) Motion p. 17, ¶ B(4-6). Appellants were prejudiced by the Trial Court's ruling that Respondents Bayview and CitiMortgage were necessary parties to the quiet title action.

Respondent MERS' failure to plead under Rule 8(c) SCRPC that Bayview and CitiMortgage were necessary parties waived that claim. "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200 (S.C. 2002). Respondent MERS and non-parties Bayview and CitiMortgage should not be able to argue for a potential benefit from an affirmative defense without being required to affirmatively plead it. *Madren v. Bradford*, 378 S.C. 187, 192-3, 661 S.E.2d 390 (Ct.App.2008), citing *Parrish v. Allison*, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007) (*Shearouse Adv. Sh. No. 43 at 58*), 376 S.C. 308, 656 S.E.2d 382 (Ct.App.2007).

Moreover, Appellants' service of process by Order of Publication under SC Code § 15-9-710(3) on John Doe Defendants 1-5,000 was final. Respondents have not alleged fraud or collusion and the Trial Court found no such fraud or collusion to set aside service in its April 11, 2011 Order. *Wachovia Bank of S.C. v. Player*, 341 S.C.424, 535 S.E. 2d 128, 130 (S.C. 2000). (When the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion.) *Id. citing Yarbrough v. Collins*, 293 S.C. 290, 360 S.E.2d 300 (S.C 1987); *Ingle v. Whitlock*, 282 S.C. 391, 318 S.E.2d 367 (S.C. 1984); *Gibson v. Everett*, 41 S.C. 22, 19 S.E. 286 (S.C. 1894); *Yates v. Gridley*, 16 S.C. 496 (S.C. 1882).

Respondent MERS admitted in its Answer in the quiet title action that it had no interest whatsoever in Appellants property as a result of its purported assignment of the purported mortgage to Respondent Bayview. MERS Answer supra. The Trial Court erred in considering

facts outside the pleadings in deciding the Rule 12(c) SCRCF motion for judgment on the pleadings and prejudiced Appellants by allowing non-parties Bayview and CitiMortgage to argue an affirmative defense which MERS never pled. April Order pp. 8-9, see also, May Order.

Respondent MERS made no allegations of fraud or collusion as to the service by publication on John Doe Defendants and that service of process was final. *Id.* No party other than Respondent MERS made an appearance in the quiet title action and the time for other parties to appear has long since run. The Trial Court's denial of Appellants' Rule 12(c) SCRCF motion for judgment on the pleadings and default judgment therefore involved the merits and affected substantial rights of Appellants and is immediately appealable under SC Code Ann. §§ 14-3-330(1) and (2)(a).

C. THE TRIAL COURT'S ORDER GRANTING MERS' RULE 12(b)(6) SCRCF MOTION TO DISMISS THE QUIET TITLE ACTION WITHOUT LEAVE TO AMEND ADJOURNED *SINE DIE* RENDERING THE ORDER IMMEDIATELY APPEALABLE AS A FINAL JUDGMENT.

1. The Trial Court's granting Respondent MERS' Rule 12(b)(6) SCRCF motion to dismiss the quiet title action without leave to amend as in spite the fact Appellants request leave (Feb. Transcript p. 75;14) was a final judgment and is immediately appealable. April Order pp. 13-14; see also, May Order, see also, Feb. Transcript p. 125;23-25. Generally, a trial judge loses jurisdiction over a case finally determined when he adjourns *sine die*. *Shillito v. City of Spartanburg*, 215 S.C. 83, 54 S.E.2d 521 (S.C. 1949). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final." *Lewis v. State*, 368 S.C. 630, 631, 630 S.E.2d 464, 464 (S.C. 2006), (quoting *Adickes v. Allison & Bratton*, 21 S.C. 245, 259 (S.C. 1884).

The Trial Court's final Orders dismiss the quiet title action on the merits in its entirety without leave to amend the quiet title complaint. April Order pp. 13-14; *see also*, May Order. The Orders require Appellants to refile all their quiet title claims in their answer to the foreclosure action *against a new party that acquired its interest in Appellants' property after the quiet title and foreclosure actions were filed* as counterclaims and third-party claims. *Id.* pp. 13-14; *Id.*. The Trial Court adjourned the proceedings in its May 20, 2011 Order without assigning a day for a further meeting or hearing on the quiet title action rendering its Order a final order that is immediately appealable. May 20 Order.

2. Even if the April 11 and May 20, 2011 Orders are not deemed final as a result of the Order stating the dismissal is without prejudice (*Id.*), its effect is one of prejudice to Appellants. The Orders are therefore immediately appealable under SC Code Ann. §§14-3-330(1), 2(a) and(c).

The Trial Court abused its discretion in dismissing Appellants original claims in the quiet title action in "the interests of judicial economy" thereby prejudicing Appellants. April Order p. 10, *see also*, May Order. The Trial Court's consolidation does not preserve Appellants' property's chain of title against which Appellants' quiet title action claims were originally filed. *Id.* p. 9, *Id.*, *see also*, Amended Complaint. The Trial Court's Orders require Appellants to refile their quiet title claims as counterclaims and third-party claims in their answer to the foreclosure action against a new party *that had no recorded interest* in Appellants' property when the quiet title action was filed *nor* when the foreclosure action was filed. *Id.*, *Id.*

The Trial Court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy. *Capital City Ins. Co. v BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524 (S.C. App. 2009), *see also Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (S.C. 1980) (“The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants.”). [Emphasis added].

Appellants should not be required to “roll the dice” on whether their original claim, properly within the jurisdiction of the circuit court, will be preserved in the “interests of judicial economy” in a subsequently filed separate action as a defendant to a party that did not appear in the quiet title action, did not file the foreclosure action and was subsequently impermissibly made a party with standing created under Rule 17(a) SCRPC. *Id.* at, 105, *see also*, April Order p. 13, *see also*, May Order, *see also*, Motion for Substitution of Plaintiff and for Substitution of Counsel for Substitute Plaintiff (“Substitution Motion”) (Exhibit 8), *see also*, Affidavit of CitiMortgage, Inc. in Support of Motion for Substitution of Plaintiff (“1st Oakes Affidavit”) (Exhibit 9), *see also*, Supplemental Affidavit of Jennifer Oakes (“2nd Oakes Affidavit”) (Exhibit 10). The Substitution Motion and the 1st Oakes Affidavit and the 2nd Oakes Affidavit will be addressed in detail *infra*.

The quiet title action was filed on September 11, 2009 *before* the foreclosure action was filed on October 27, 2009. In the “interests of judicial economy,” the Trial

Court ordered the quiet title action and foreclosure action to “be consolidated in some manner.” April Order p. 10, *see also*, May Order.

The ruling, in effect, allows Respondent MERS to avoid the quiet title action claims as filed against it all together as a result of it purportedly assigning Appellants’ Refi Note and purported mortgage to Respondent Bayview on September 25, 2009 (“September 25, 2009 Assignment”) (Exhibit 11) after MERS had been served in the quiet title action but before MERS filed its Answer in the quiet title action. MERS Answer p. 2 ¶ 12, April Order p. 9-10, *see also*, May Order. Respondent Bayview then purportedly subsequently assigned its interest in Appellants’ Refi Note and purported mortgage on March 17, 2009 to Respondent CitiMortgage after Bayview filed the October 27, 2009 foreclosure action. March 17, 2010 Assignment (Exhibit 12).

Appellants claimed in the Trial Court that both the September 25 Assignment and the March 17, 2010 Assignment were fraudulent. *See*, Affidavit of Lynn Szymoniak, Esq. as Defendants’ Expert (“Szymoniak Affidavit”) (Exhibit 13), *see also*, Rule 59(e) Motion pp. 10-11. Appellants claimed in the Trial Court that both the September 25, 2009 Affidavit and the March 17, 2010 Assignment were invalid as it was not propbated as required under SC Code Ann. § 30-7-50. Defendants’ Brief in support of Their Motion to Dismiss Pursuant to SCRPC 12(b)(6) (“Defdts. 12(b)(6) Brief”), pp. 2,3,10 (Exhibit 14).

The April 11, 2011 and May 20, 2011 Orders consolidating the quiet title action and foreclosure action “in the interests of judicial economy ... in some manner” involves the merits of the quiet title action affecting a substantial right of Appellants, striking the quiet title pleading and striking Appellants’ defenses in the foreclosure action for a Rule

13(a) SCRCP motion to dismiss the action as a compulsory counterclaim to the quiet title action and a Rule 12(b)(8) motion to dismiss for the foreclosure action containing the same parties as the quiet title action.

The Trial Court's Order consolidating the quiet title action and foreclosure action involves the merits, does not protect Appellants' substantial rights and strikes Appellants' defenses in the foreclosure action which was an abuse of discretion. As a result, the April 11, 2011 and May 20, 2011 Orders involving the quiet title action are therefore immediately appealable under SC Code Ann. §§14-3-330(1), 2(a) and(c).

II. ALL OF THE TRIAL COURT'S RULINGS RELATED TO THE FORECLOSURE ACTION IN THE APRIL 11, 2011 AND MAY 20, 2011 ORDERS ARE IMMEDIATELY APPEALABLE.

D. THE TRIAL COURT'S ORDER DISMISSING APPELLANTS' RULE 13(a) SCRCP MOTION TO DISMISS THE FORECLOSURE ACTION BECAUSE IT SHOULD HAVE BEEN FILED AS A DEFENSE TO THE QUIET TITLE ACTION AND 12(b)(8) SCRCP MOTIONS TO DISMISS THE FORECLOSURE ACTION FOR SAME PARTIES AS THE QUIET TITLE ACTION IS IMMEDIATELY APPEALABLE UNDER SC CODE ANN. §§14-3-330(1), 2(a) and(c).

The Trial Court's April 11, 2011 and May 20, 2011 Orders denied Appellants' Rule 13(a) SCRCP Compulsory Counterclaims Motion and 12(b)(8) SCRCP Same Parties Motion on the basis that the quiet title action was denied because Appellants did not name Respondent Bayview and CitiMortgage as necessary parties in the quiet title action. April Order p. 10, *see also* May Order, *see also*, Feb. Transcript pp.125;12 – 128;6. The trial Court never heard the Rule 13(a) or 12(b)(8) SCRCP motions and its decision did not consider Appellants' briefs in support of either motion. *Id.*, *Id.*, *Id.*, *see also*, Defendants' Brief in Support of Their Motion to Dismiss Pursuant to SCRCP 13(a) ("Pltfs. 13(a) Brief") (Exhibit 15), *see also* Rule 59(e) Motion p. 21 ¶ (A)(1-8). Appellants now are forever deprived of these pleadings and defenses in the foreclosure action because there is no quiet title action in which to assert the defenses of a compulsory

counterclaim or that the quiet title action involved the same parties and/ or seek a default judgment to the quiet title action.

Appellants served MERS in the quiet title action by personal service on September 17, 2009. MERS purportedly assigned the Refi Note and purported mortgage to Respondent Bayview on September 25, 2009. April Order pp. 9-10. The close-connectedness doctrine provides that a transferee does not take an instrument in good faith when the transferee is so closely connected with the transferor that the transferee may be charged with knowledge of an infirmity in the underlying transaction. *MidFirst Bank v. Haynes*, 893 F. Supp. 1304 (1994), *see also Mortgage Electronic Registration Systems, Inc. v Leonard F. Girdvanis, Jr., et al.*, 2005-CP-43-0278, Sumter County, South Carolina, Court of Common Pleas for the Thirteenth Judicial Circuit, *see also Arcanum National Bank v. Hessler*, 433 N.E.2d 204 (Ohio 1982). *See also HIMC Investment Company v. Sicliano*, 246 A.2d 502, 507 (N.J. Super. Ct. Law Div. 1968). The close-connectedness doctrine allows a court to impute knowledge to the transferee when the relationship between the transferee and the transferor is sufficiently close to warrant such an imputation. 893 F. Supp. 1304 (1994) *Supra*.

Respondents Bayview is a member of MERS. The MERS Foreclosure Manual, Section 1. states "MERS shall within two (2) business days forward to the appropriate Member or Members, in the form prescribed by and otherwise in accordance with the Procedures, all properly identified notices, payments, and other correspondence received by MERS with respect to mortgage loans registered on the MERS® System for which Mortgage Electronic Registration Systems, Inc. serves as mortgagee of record.". Further, the signing officer Robert G. Hall, for the assignor, MERS, is also an officer of plaintiff Bayview.

Per the MERS foreclosure manual, Respondents were given notice of the quiet title action by the stated MERS process. Moreover, Respondent Bayview is precluded from claiming that it took the assignment from MERS without notice of the quiet title action. The assignment came from a Bayview officer wearing a MERS hat at the time of purportedly assigning the note and mortgage. As such this Court can impute knowledge to the transferee because the relationship between the transferee and the transferor is sufficiently close to warrant such an imputation. Respondent Bayview had actual notice of the Appellants prior quiet title action at the time it filed the foreclosure action and should have asserted its claims against Appellants in the quiet title action as compulsory counterclaims.

Both the quiet title action and the foreclosure action arise from the same transaction – the November 3, 2006 refinance loan transaction. The purpose of Rule 13(a) is “to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.” *Beach Co. v. Twillman, LTD.*, 566 S.E. 2d 863, 865 (S.C. App. 2002) citing *First-Citizens Bank & Trust Co. v. Hucks*, 408 S.E.2d 222, 223 (1991). “[R]ules of procedure, like statutes, should be given their plain meaning.” *Id. citing Valentine v. Davis*, 460 S.E.2d 218, 220 (Ct.App.1995).

“By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party’s claim.” *Id. citing First-Citizens Bank & Trust Co. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). The test for determining if a counterclaim is compulsory is whether there is a “logical relationship” between the claim and the counterclaim. *Id. citing Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). Whether a counterclaim is logically related to the initial claim depends upon the facts of each case. *See Hucks*, 305 S.C. at 298, 408 S.E.2d at 223 (finding a logical relationship between a

trustee regarding the administration of a trust and a legal counterclaim alleging that the trustee breached a fiduciary duty); *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518–19, 381 S.E.2d 903, 905 (1989) (finding a logical relationship between an action on a note brought by the lender to foreclose and the validity of a purported oral agreement modifying the note alleged by the borrower).

“If a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997). The South Carolina Reporter’s Note following Rule 13 states: “[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are ‘compulsory’ under Rule 13(a) and are barred by *res judicata* or *estoppel by judgment* if not asserted.” The Reporter’s Note also notes that South Carolina’s Rule 13(a) is the same as the federal rule on counterclaims. Accordingly, we may rely on federal law to interpret our Rule 13.” *Id.* citing *Brown v. Leverette*, 291 S.C. 364, 366–67, 353 S.E.2d 697, 698–99 (1987) (utilizing federal law to interpret a state rule that tracked the language of the corresponding federal rule).

Here, Respondents’ claims in this action arise out of the transaction that is the subject matter of the Quiet Title action – the purported closing of a loan transaction dated November 3, 2006 – and does not require the presence of third parties of whom the court cannot acquire adjudication. Respondents’ claims for reformation of the mortgage and foreclosure of the mortgage are logically related to the quiet title action and therefore should have been asserted in that action as compulsory counterclaims. As such Respondents are precluded from bringing them in this separate action and the foreclosure action should be dismissed with prejudice.

If a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action and is barred by *res judicata* or *estoppel by judgment* if not asserted. Respondents' failure to assert its claims as compulsory counterclaims in the defendants' quiet title action precludes them from asserting those claims here, in this separate action.

As stated above, the Trial Court erred in its ruling dismissing the quiet title action. The Order denying Appellants' Rule 13(a) and 12(b)(8) motions involves the merits of the quiet title action affecting substantial rights of Appellants and strikes Appellants' compulsory counterclaim and same parties defenses in the foreclosure action. Therefore, the Trial Court's Orders denying Appellants' Rule 13(a) SCRPC and 12(b)(8) SCRPC motions are immediately appealable under SC Code Ann. §§14-3-330(1), 2(a) and (c).

E. THE TRIAL COURT'S ORDER PREPARED BY RESPONDENTS' COUNSEL DENYING APPELLANTS' RULE 12(b)(6) SCRPC MOTION OMITS APPELLANTS' CLAIM THAT BAYVIEW WAS NOT THE OWNER OF THE REFI NOTE WITH AUTHORITY TO ENFORCE THE REFI NOTE AND ERRONEOUSLY STATES THAT BAYVIEW WAS THE SERVICER WHEN IN FACT THE FORECLOSURE COMPLAINT DID NOT ALLEGE ANYWHERE THEREIN THAT BAYVIEW WAS THE SERVICER AND IS THEREFORE IMMEDIATELY APPEALABLE UNDER SC CODE ANN. §§14-3-330 (2)(a).

The Trial Court's April 11, 2011 Order was drafted by Respondents' counsel Brian P. Crotty, Esq. Feb. Transcript p. 128;10,11. The April Order at pp. 11-13 omits Appellants' claims asserted in the foreclosure action that Respondent Bayview was not the holder and owner of the Refi Note with no authority to enforce the Refi Note under SC Code Ann. § 36-3-201(a) and (b). Defdts. 12(b)(6) Brief 2, 6, 10, *see also*, Rule 59(e) Motion pp. 23 ¶ B(3),(4)(i-iii), *see also*, Feb. Transcript p. 106;14 – p. 109;4. Moreover, nowhere in the Foreclosure Complaint does Respondent Bayview claim it is the servicer of the Refi Note. In fact, the word "servicer" is not contained *even one time* in the Bayview

Foreclosure Complaint. Bayview Foreclosure Complaint (Exhibit 16).

Thus, neither the April Order nor the May Order considered Appellants' argument as pled and are based on facts that were not pled by Respondent Bayview in the Foreclosure Complaint. Bayview Foreclosure Complaint ¶ 3. The effect of omitting the Appellants' claim of lack of ownership and authority to enforce the Refi Note and consideration of facts not pled by Bayview in its complaint, as the basis to determine Respondent Bayview's standing in a Rule 12(b)(6) SCRCF motion, affects a substantial right of Appellants and in effect determines the action and prevents a judgment from which an appeal might be taken. The Trial Court's denial of appellants' Rule 12(b)(6) SCRCF motion is therefore immediately appealable under SC Code Ann. §§ 14-3-330 (2)(a).

If a judgment is not a final judgment an appellate court should look to the effect of an interlocutory order to determine its appealability under S.C. Code Ann. § 14-3-330. *Thornton v. South Carolina Elec. & Gas Corp.* 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011) citing *Bowden v. Powel*, 194 S.C. 482, 10 S.E.2d 8 (S.C. 1940), *Miles v. Charleston Light & Water Co.*, 87 S.C. 254, 69 S.E.2d 292 (S.C. 1910). Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (S.C. 2000) citing *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (S.C. 1985). "If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings." *Thornton supra*, at 479 (citing *Bowden supra*

quoting *Harbert v. Atlanta & Charlotte Air Line Ry. Co.*, 74 S.C. 13, 16, 53 S.E. 1001, 1001-02, (S.C 1906)).

A Rule 12(b)(6) SCRCF motion to dismiss is a procedural device used to test the sufficiency of a complaint. In deciding a motion to dismiss pursuant to Rule 12(b)(6) SCRCF, *the trial court should consider only the allegations set forth on the face of the plaintiff's 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 v. Onorato*, 318 S.C 297, 457 S.E.2d 601, 602 (S.C. 1995). (Emphasis added). 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 v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (S.C. 1987).

A party's lack of standing as a real party in interest deprives a court of subject matter jurisdiction. *Bardoon Properties, NV v. Eidolon Corporation*, 326 S.C. 166, 485 S.E.2d 371 (S.C., 1997) citing *Richland County Recreation District v. City of Columbia* 290 S.C. 93, 348 S.E.2d 363 (1986); *Anders v. S.C. Parole and Comm. Corrections Board*, 279 S.C. 206, 305 S.E.2d 229 (1983). See e.g., *Bailey v. Bailey*, 312 S.C. 454, 441 S.E.2d 325 (1994); *Duke Power Co. v. South Carolina Public Service Comm'n*, 284 S.C. 81, 326 S.E.2d 395 (1985); *Dockside Assoc., Inc. v. Detyens, Simmons*, 285 S.C. 565, 330 S.E.2d 537 (Ct.App.1985), *overruled in pt. on other grounds*, *Queen's Grant Villas v. Daniel Int'l Corp.*, 286 S.C. 555, 335 S.E.2d 365 (to have standing, a party must have both a personal stake in the subject matter of a lawsuit and be the "real party in interest"). (Emphasis added).

There is a difference between the concepts of “standing,” “capacity to sue,” and “real party in interest.” See Wright, Miller and Kane, Federal Practice and Procedure, § 1542 at pp. 328-329 (1990). “[P]laintiff must both be the real party in interest and have standing.” *Id.* Without standing, the Court lacks subject matter jurisdiction over the parties regardless the real party in interest rule. *Id.* See also *Nix v. Mercury Motor Express, Inc.*, 270 S.C. 477, 242 S.E.2d 683 (1978) (“[a] court lacking subject matter jurisdiction, however, has no authority to act regardless . . .”).

“Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself. At the same time, the focus on the party may take account of the relationship between the party and the claim being advanced—a party who might have standing to advance a claim not made may lack standing to advance a different claim that is made.” Wright Miller and Kane, *Supra* at § 3531.

“[B]ecause of separation from the merits, it is commonly said that standing must exist at the time an action is filed. Post-filing events that supply standing that did not exist on filing may be disregarded, denying standing despite a showing of sufficient present injury caused by the challenged acts and capable of judicial redress.” (Emphasis added). *Id.*

Thus the Trial Court ignored this in both dismissing the quiet title action but not dismissing the foreclosure action. The real-party-in-interest “rule is similar to, though distinct from, the requirement that the plaintiff have standing to sue, in that “whether a party has standing hinges upon the facts at the inception of litigation.” *Moss v. Spartanburg County School Dist. No. 7* --- F.Supp.2d ---, 2011 WL 1296699 (D.S.C. 2011) quoting *Friends of the Earth, Inc. v.*

Laidlaw Envtl. Servs., 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (“[W]e have an obligation to assure ourselves that [the plaintiff] had Article III standing at the outset of litigation.”). “The plaintiff’s burden to demonstrate standing is congruent with the plaintiff’s burden of proof at different stages in the litigation. *Stephens v. County of Albemarle*, 524 F.3d 485, 491 (4th Cir.2008). At the summary judgment stage, therefore, the plaintiff can no longer predicate standing on general factual allegations; rather, the plaintiff must furnish, “by affidavit or other evidence, specific facts, which for purposes of the summary judgment motion will be taken to be true.” *Lujan v. Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. 2130 (1992).

The Trial Court’s April 11, 2011 Order addresses Appellants’ claim that Bayview was not the holder of the Refi Note with authority to enforce it under SC Code Ann. § 36-3-201(a) and (b) by stating “[t]he Junks contend that Bayview lacked standing to bring the Foreclosure Action because it was not the holder of the Note. At the time the Foreclosure Action was initiated by Bayview, it was the servicer of the Junks’ loan.” April Order p. 11. Whether Bayview was the servicer or not is inapposite here, as neither the Appellants nor the Respondents made any claim whatsoever related to Bayview’s status as the servicer of the Refi Note. The April Order drafted by Respondents’ counsel Mr. Crotty, then goes on to justify why a servicer has Article 3 standing in Bankruptcy Court to lift the automatic stay as opposed to analyzing prudential standing principles that would appropriately determine the instant issue. The entire analysis all together ignores the claims pled in the Foreclosure Complaint and the claims asserted by appellants in their Rule 12(b)(6) SCRCF Motion.

By creating standing on facts not asserted in the Bayview Foreclosure Complaint and simultaneously substituting CitiMortgage under a real party in interest theory *after* the action

was commenced⁴, the Trial Court's April Order and May Order in effect determines the action preventing a judgment from which an appeal might be taken. The Trial Court's impermissible consideration of facts not pled to create standing is therefore immediately appealable under SC Code Ann. 14-3-330 (2)(a). If allowed to stand at this stage in the action, substitute plaintiff CitiMortgage's fiat standing as opposed to prudential standing based on the facts as pled by Respondent Bayview in its Foreclosure Complaint, will prevent Appellants from challenging the factual allegations of the Bayview Foreclosure Complaint at the summary judgment stage. *See Stephens*, 524 F.3d 485, 491 (4th Cir.2008). The Trial Court's denial of appellants Rule 12(b)(6) SCRCF motion is therefore immediately appealable under SC Code Ann. 14-3-330 (2)(a).

F. RESPONDENTS' JOINT MOTION TO SUBSTITUTE PLAINTIFF TO CREATE STANDING WHERE NONE EXISTED ORIGINALLY THAT WAS GRANTED WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT AND IS THEREFORE IMMEDIATELY APPEALABLE UNDER SC CODE ANN. §§14-3-330 (2)(a).

The Trial Court's April 11, 2011 Order granting Respondents' Bayview's and CitiMortgage's March 30, 2010 joint motion to substitute CitiMortgage for Bayview as Plaintiff under Rule 25(c) SCRCF was an abuse of discretion impermissibly creating standing where none existed originally that affects Appellants' substantial rights and in effect determines the action and prevents a judgment from which an appeal might be taken. April Order p. 12, see also Defendants Brief in Opposition to Plaintiffs Motion to Substitute Plaintiff (Exhibit 17). The Trial Court abused its discretion by creating standing through the Substitution Motion. ("Even if

⁴ The Trial Court ignored the fact that the motion to substitute plaintiff was brought under Rule 25(c) SCRCF stating that CitiMortgage purchased the Refi Note from Bayview on or about March 9, 2009. Transfer of interest is proper after an action has been commenced. Rule 17(a) SCRCF real party in interest theory is proper only when the interest of the real party originated prior to the commencement of the action. The Trial Court's April and May Orders are in error in that they granted substitution under an inconsistent legal doctrine and theory that was not properly before the Trial Court.

Bayview had lacked standing to bring the Foreclosure action, any issue as to standing is resolved by the substitution of CitiMortgage as the Plaintiff.”). *Id.* Therefore, the Trial Court’ granting of Respondents’ Rule 25(c) SCRCP motion to substitute plaintiff is immediately appealable under SC Code Ann. 14-3-330 (2)(a).

“Rule 25(c) is applicable where there is a transfer of interest *during* the pendency of an action, whereas Rule 17 is applicable where there is a transfer of interest *prior* to the commencement of an action.” *Bryant v. Waste Management, Inc.*, 342 S.C. 159, 536 S.E.2d 380 (S.C. Ct. App. 2000) *citing* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1958, at 553 (2d ed.1986).

“Rule 25(c) speaks to the situation in which “an interest is transferred” during the pendency of an action. If an interest has been transferred prior to commencement of the suit, Rule 17, requiring that an action be brought in the name of the real party in interest and defining capacity to sue and be sued, is controlling. After suit is brought, Rule 25(c) becomes the relevant provision. The rule applies to ordinary transfers and assignments, as well as to corporate mergers.” *See* Wright, Miller and Kane, *Federal Practice and Procedure*, § 1958 Transfer of Interest in Action; 7C Fed.Prac. & Proc. Civ. § 1958 (3d ed.) (2010).

The Court erred in its Order on p. 13 ¶ F in ruling that “[t]his motion is based on the *assignment of the mortgage* from Bayview to CitiMortgage.” [Emphasis added]. Respondents’ Substitution Motion states it is based on the fact that *CitiMortgage purchased the Refi Note and purported mortgage from Bayview on or about March 9, 2010 and that Bayview indorsed the Refi Note and purported mortgage to CitiMortgage on or about March 9, 2010. See Substitution Motion.* The Substitution Motion is supported by the 1st Oakes Affidavit stating under oath that *CitiMortgage purchased the Refi Note on or about March 9, 2010 and that Bayview indorsed the*

Refi Note to CitiMortgage on or about March 9, 2010. Thereafter, on December 6, 2010, CitiMortgage submitted the 2nd Oakes Affidavit as a supplemental affidavit to the Joint Motion to Substitute. In the 2nd Oakes Affidavit, CitiMortgage and Jennifer Oakes stated that the grounds for the Rule 25(c) SCRCF Substitution Motion were incorrect. The 2nd Oakes Affidavit states under sworn testimony and the penalty of perjury, that, CitiMortgage has always had the Refi Note since some unknown date prior to January 22, 2007 and that AHM indorsed the Refi Note to CitiMortgage – not Bayview as previously sworn to in the 1st Oakes Affidavit.

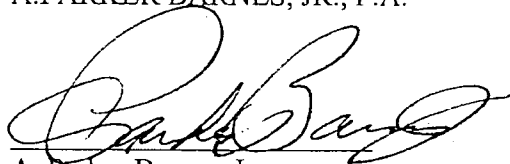
If the 2nd Oakes Affidavit is true (which Appellants explicitly deny) then the Trial Court's granting Respondent's Rule 25(c) Substitution Motion was improper and the Trial Court erred. If the 2nd Oakes Affidavit is true it therefore means that bay view never owned or held the note by law and did not have standing to bring the foreclosure action initially.

The Trial Court abused its discretion in using Rule 17(a) SCRCF to create standing thereby. A party's lack of standing as a real party in interest deprives a court of subject matter jurisdiction. *Bardoon Properties, NV*, 326 S.C. 166, 485 S.E.2d 371 (S.C., 1997). The Trial Court abused its discretion in creating standing after the action had been commenced. The Trial Court lacked jurisdiction over Appellants as a result of bay view having no standing at the time the action was commenced and abused its discretion in creating jurisdiction and standing under Rule 17(a) SCRCF without jurisdiction having been originally invoked by Bayview at the commencement of the foreclosure action. The Trial Court abuse its discretion in granting Respondents' Rule 25(c) Substitution Motion affecting a substantial right of Appellants and in effect determines the action and prevents a judgment from which an appeal might be taken. Therefore the Order is immediately appealable under SC Code Ann. § 14-3-330 (2)(a).

CONCLUSION

Based on the foregoing, the April 11, 2011 and the May 20, 2011 orders for which Appellants' seek review are immediately appealable either as a final judgment or under SC Code Ann. § 14-3-330 and its various subsections. The Respondents' Motion to Dismiss should therefore be denied by this Court.

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



A. Parker Barnes, Jr.
Post Office Drawer 1729
500 Carteret Street
Beaufort, South Carolina 29901
(843) 522-2600
Counsel for Appellant Christine Junk



Daniel L. Junk, J.D.
Pro Se Appellant
181 Oldfield Way
Okatie, SC 29909
(843) 290-8469

Beaufort, South Carolina
June 23, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY COURT
Court of Common Pleas

Honorable Marvin H. Dukes, III, Master in Equity

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-07-04301

Bayview Loan Servicing, LLC,

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.

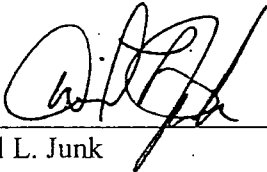
Case No. 2009-CP-07-05088

Proof Of Service

I, the undersigned, do hereby certify that I have served all counsel in this action with a copy of the pleadings(s) hereinbelow by all by hand delivering a copy to the following address(es):

Pleading(s); Opposition To Motion To Dismiss

Counsel Served: Brian P. Crotty
 Nelson Mullins Riley & Scarborough LLP
 Meridian, 17th Floor
 1320 Main Street
 Columbia, SC 29201



Daniel L. Junk

June 23, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY COURT
Court of Common Pleas

Honorable Marvin H. Dukes, III, Master in Equity

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-07-04301

Bayview Loan Servicing, LLC,

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.

Case No. 2009-CP-07-05088

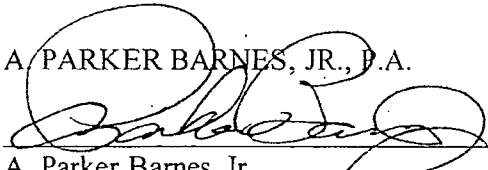
Affidavit

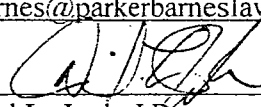
PERSONALLY appeared before me, A. Parker Barnes, Jr., of the firm A. Parker Barnes, Jr., P.A., and Daniel L. Junk, JD, Pro Se Litigant, in the above-captioned matter, who being duly sworn, deposes and says:

1. That I, A. Parker Barnes, Jr., am the attorney for the Appellant Christine H. Junk in the above-captioned matter.
2. That I, Daniel L. Junk, am the *Pro Se* Litigant in the above-captioned matter.
3. That the attached Index of Exhibits is a genuine and authentic copy of the documents filed in the Trial Court.

FURTHER AFFIANT SAYETH NOT.

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

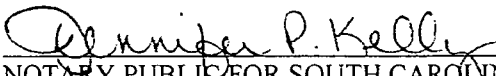

A. Parker Barnes, Jr.
P.O. Drawer 1729
Beaufort, South Carolina 29901-1729
(843)522-2600
(843)522-2610 fax
apbarnes@parkerbarneslaw.com


Daniel L. Junk, J.D.
Pro Se Litigant
181 Oldfield Way
Okatie, SC 29909
(843)290-8469

Beaufort, South Carolina

June 23, 2011

Sworn to and Subscribed before me
this 23rd day of June 2011.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 02-01-2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-in-Equity

Marvin H. Dukes, III, Master-in-Equity

Civil Action No.: 2009-CP-07-04301
&
Civil Action No.: 2009-CP-07-05088

CitiMortgage, Inc., ... Respondent,
v.

Daniel L. Junk and Christine H. Junk, and
Oldfield Community Association,

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

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

CitiMortgage Inc., ... Counterclaim Respondent,

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., Lawyer Title Insurance
Corporation, Corelogic, Inc., and American
Home Mortgage Holdings, Inc., ...

RECEIVED

APR 30 2012

SC Court of Appeals

Third-Party Respondents.

Proof of Service

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Plaintiff, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow by all by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Respondents CitiMortgage, Inc., Bayview Loan Servicing, LLC, Merscorp, Inc., Mortgage Electronic Registration Systems, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., Jennifer Oakes, and Robert G. Hall's Return to the Motion to Dismiss or Stay in the Alternative the Foreclosure Action Pending Appeal of Quiet Title Action

Counsel Served:

A. Parker Barnes, Jr.
P.O. Drawer 1729
Beaufort, SC 29901-1729

Daniel L. Junk
181 Old Field Way
Okatie, SC 29909

Andrew E. Colvin
Nexsen Pruet, LLC
P.O. Box 23256
Hilton Head Island, SC 29925

James Y. Becker
Haynsworth Sinkler Boyd. P.A.
P.O. Box 11889
Columbia, SC 29221-1889

John T. Lay
Gallivan White & Boyd, P.A.
P.O. Box 7368
Columbia, SC 29202

Sean Michael Bolchoz
Hale & Bolchoz, LLC
P.O. Box 22561
Hilton Head Island, SC 29925

Demetri "Jim" K. Koutrakos
Callison Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202

Elizabeth Van Doren Gray
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Susan Taylor Wall
McNair Law Finn. P.A.
Post Office Box 1431
Charleston. South Carolina 29402

Maria E. Kiehling
Buist, Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464



Jennifer B. Lee
Administrative Assistant

April 30, 2012

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9024
www.nelsonmullins.com

Michael J. Anzelmo
Tel: 803.255.9312
Fax: 803.255.9024
michael.anzelmo@nelsonmullins.com

April 30, 2012

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: Daniel L. Junk and Christine H. Junk vs. Mortgage Electronic Registration
Systems, Inc., and John Does 1-5000
Civil Action No.: 2009-CP-07-04301; and

Bayview Loan Servicing, LLC v. Daniel Junk a/k/a Daniel L. Junk, Christina
H. Junk and Oldfield Community Association
Civil Action No. 2009-CP-07-5088

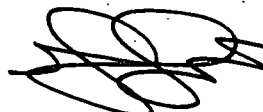
NMRS File No.: 26019/01531

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of a Return to the Motion to Dismiss or Stay
in the Alternative the Foreclosure Action Pending Appeal of Quiet Title Action in the above-
referenced matter. Please file the original and return a clocked-in copy to me via our courier.
Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing counsel.

Very truly yours,



Michael J. Anzelmo

RECEIVED

APR 30 2012

MJA:jlee
Enclosures

SC Court of Appeals