

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-16-01120

Amanda and Michael Griggs..... Appellant,

v.

Nationstar Mortgage, LLC..... Respondent,

FINAL BRIEF OF THE APPELLANT

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SC Court of Appeals

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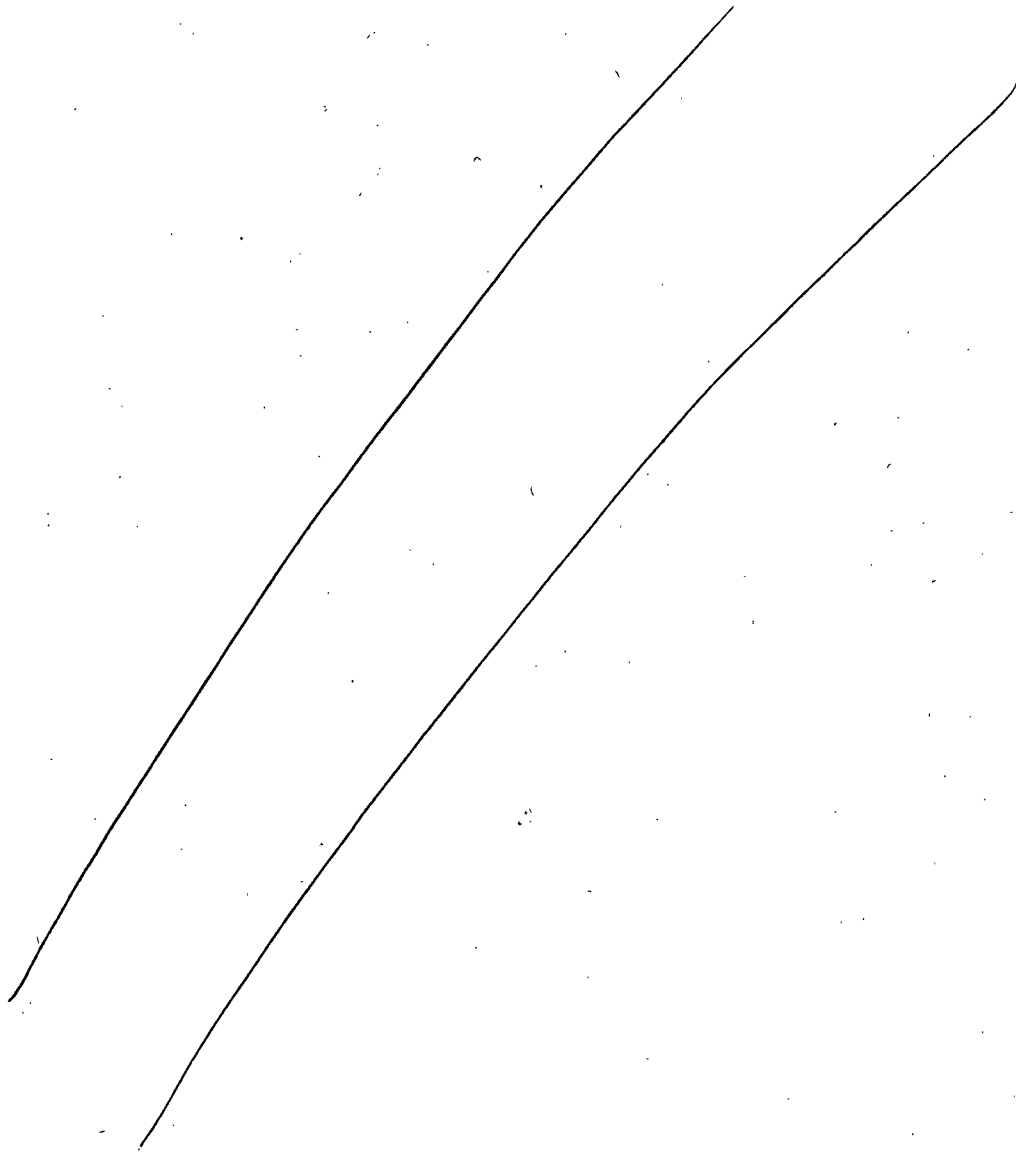
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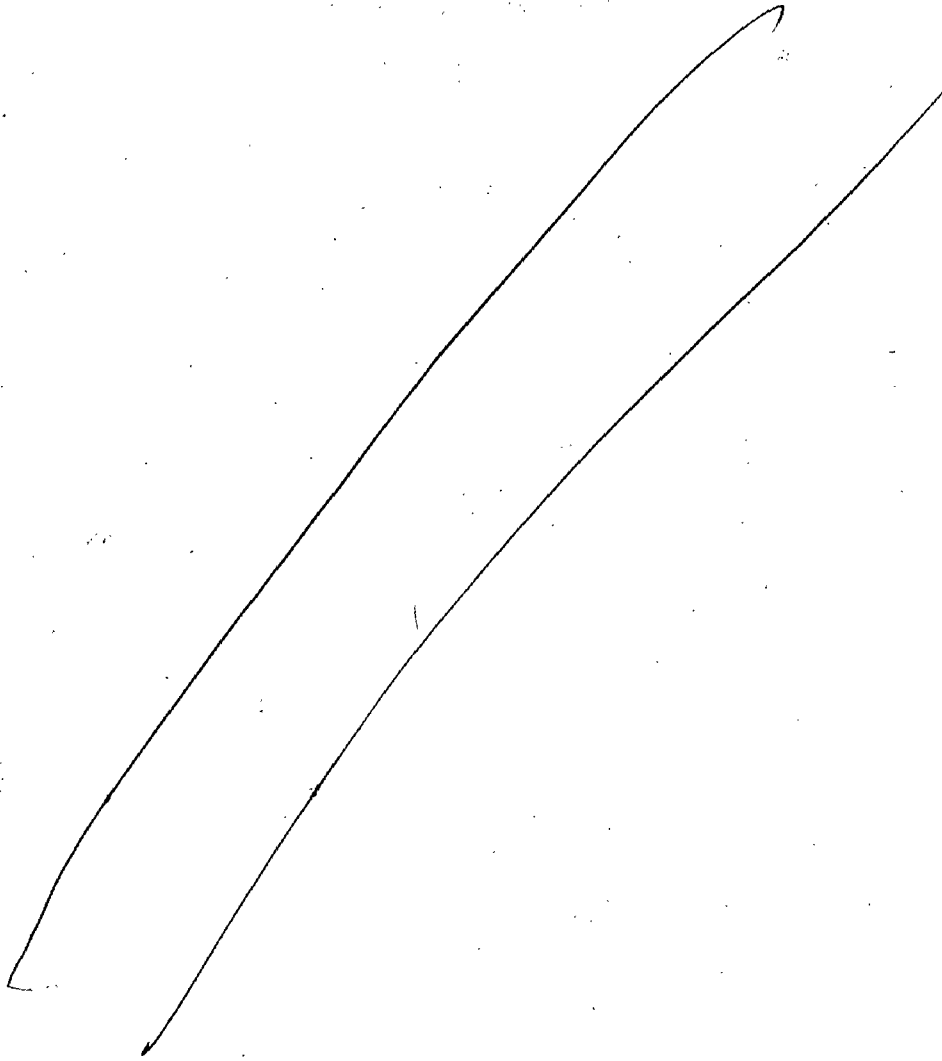
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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT COMMIT AN ERROR OF LAW IN GRANTING NATIONSTAR'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSING THE GRIGGS' DEFAMATION CLAIMS?
2. DID THE CIRCUIT COURT COMMIT AN ERROR OF LAW IN GRANTING NATIONSTAR'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSING THE GRIGGS' CLAIMS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACT?
3. DID THE CIRCUIT COURT COMMIT AN ERROR OF LAW IN GRANTING NATIONSTAR'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSING THE GRIGGS' CLAIMS FOR VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT?
4. DID THE CIRCUIT COURT COMMIT AN ERROR OF LAW IN GRANTING NATIONSTAR'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSING THE GRIGGS' CLAIMS FOR NEGLIGENT MISREPRESENTATION?

STATEMENT OF THE CASE

Nationstar held a mortgage note on the Griggs' property. (R. p. 13, ¶ 4). On or about April 15, 2010, the Griggs suffered a residential home fire. *Id.* On or about April 16, 2010, the Griggs requested a payoff amount from Nationstar for insurance purposes. (R. p. 14, ¶ 5). Nationstar provided the payoff amount as of that date to be \$182,604.80. *Id.* On April 23, 2010, the Griggs received a check from their insurance company made out to Nationstar and the holder of another mortgage on the property, non-party Ditech. (R. p. 14, ¶ 6). Nationstar requested a check payable solely to Nationstar, and the Griggs requested such from their insurance company. *Id.*

The Griggs received the payoff check made payable to Nationstar from their insurance company on April 29, 2010 and contacted Nationstar, notifying

them of such. (R. p. 14, ¶ 7). Nationstar agreed to send a payoff statement to the Griggs, and requested the Griggs return that payoff statement with the payoff check. Id.

On May 4, 2010, the Griggs received a payoff statement from Nationstar. However, that payoff statement was for "Jose Ortiz." The Griggs promptly notified Nationstar of this problem. Nationstar subsequently faxed the Griggs another payoff statement for the loan. However, this payoff statement was for a payoff amount of \$184,535.50, which was of course different from the payoff amount they had been given previously. When the Griggs brought this discrepancy to Nationstar's attention, they were told to forward the insurance check in the amount of \$182,604.80 with the payoff statement and that Nationstar would try to fix the discrepancy. (R. pp. 14-15, ¶¶ 8 and 9).

Eventually, the Griggs received a third payoff amount from Nationstar in the amount of \$185,310.48. (R. p. 15, ¶ 11).

On or about May 17, 2010, the Griggs began attempting to secure financing so that they could begin construction on a new home. During these attempts to secure the financing, credit reports were run and the Griggs learned that Nationstar was reporting that the Griggs had been late several times with their mortgage payments. This information was false, and the Griggs immediately contacted Nationstar and demanded the false credit reporting be corrected. (R. p. 15, ¶ 10).

What followed for the Griggs was a 3-4 month odyssey during which Nationstar issued false credit reporting information against the Griggs, causing the Griggs to lose out on lower interest rates and eventually forcing the Griggs

into a position where they were compelled to refinance their loan with Nationstar in order to complete the construction on their home. (R. pp. 15-18, ¶¶ 12-27).

On May 29, 2012, the parties appeared before the Court for oral argument on the Griggs Motion to Compel and Nationstar's Motion for Judgment on the Pleadings. At that time, the parties informed the Court that they had executed a Consent Confidentiality Order which they believed would resolve the outstanding discovery issues subject to the Griggs' Motion to Compel. Argument proceeded on Nationstar's motion.

An order was signed by the court on June 7, 2012 granting Nationstar's motion for judgment on the pleadings and dismissing the Griggs' entire complaint with prejudice. That order was served on the parties via correspondence sent via facsimile on June 11, 2012. The Griggs timely filed a Motion to Alter or Amend Judgment on June 20, 2012. After considering the Griggs' motion and memorandum submitted by the parties, the court denied the motion to alter or amend. That order was filed on July 27, 2012. This appeal follows.

I. STANDARD OF REVIEW

Rule 12(c) of the South Carolina Rules of Civil Procedure permits judgment on the pleadings when the complaint fails to state facts sufficient to constitute a cause of action. "A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor." Sapp v. Ford Motor Co., 386 S.C. 143, 146 (2009). "The reviewing Court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to

relief on any theory of the case.” Bradshaw v. Anderson County, 388 S.C. 257, 262 (2010) (internal punctuation omitted).

Furthermore, “a judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment.” Russell v. Columbia, 305 S.C. 86 (1991) citing Brown v. United Insurance Co. of America, 268 S.C. 254 (1977). “When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment.” *Id.* citing Crowe v. Domestic Loans, Inc., 242 S.C. 310 (1963). “Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever.” *Id.* citing Baldwin v. Sanders, 266 S.C. 394 (1976). “Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties.” *Id.* citing Manning v. Dial, 271 S.C. 79 (1978). “Further, a judgment on the pleading is considered to be a drastic procedure by our courts.” *Id.* citing U.S. Casualty Co. v. Hiers, 233 S.C. 333 (1958).

II. ARGUMENT

- A. THE CIRCUIT ERRED IN GRANTING NATIONSTAR’S MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSING THE GRIGGS’ DEFAMATION CLAIMS AS THE CLAIM PRESENTS A GENUINE ISSUE OF MATERIAL FACT AND IS NOT PREEMPTED BY FEDERAL LAW.

The Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. (“FCRA”) states that a, “consumer may bring an action or proceeding in the nature of

defamation...or negligence with respect to the reporting of information against...a consumer reporting agency” when information furnished by such an agency is “furnished with malice or willful intent to injure such consumer.”

“The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm cause by the publication.” Murray v. Holnam, Inc., 344 S.C. 129 at 139 (2001). “A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community **or to deter third persons from associating or dealing with him.**” Id., emphasis added.

State defamation claims are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681h(e), **except** as to false information furnished with “malice or willful intent to injure.” Beattie v. Nationscredit Financial Servs. Corp. 69 Fed. Appx. 585, 589 (4th Cir. 2003); Ross v. FDIC, 625 F.2d 808, 813 (4th Cir. 2010), emphasis added. While the order cites Ross, the trial court has overlooked important distinctions between the present case and Ross. In Ross, the genesis of the false reporting was that Ross had been mistakenly listed as being responsible for a loan her estranged husband was responsible for. However, the Ross court noted that the record was “**replete with evidence** that WaMu made a regrettable but honest mistake **and took action to remedy this error once Ross brought it to WaMu’s attention.**” Further, the Ross court noted that the mistake was caused by WaMu’s efforts to comply with Ross’ wishes, which the court

noted presented “a unique and rather complicated set of circumstances.” Ross at 815, emphasis added.

In contrast to Ross, there is no evidence in the record to support that the actions or failures to act by Nationstar were “honest mistakes” for which Nationstar took action to remedy. Despite claiming such in their answer (see Third and Fourth Defenses of Defendant’s Answer) (R. p. 29), Nationstar refused to respond to discovery requests meant to investigate these affirmative defenses. As the Griggs argued in their motion to compel discovery below, Nationstar asserted several affirmative defenses alleging any actions or failures to act on their part were “honest mistakes” for which Nationstar took action to remedy and/or had procedures in place so as to avoid such problems. Despite asserting those defenses, Nationstar balked at allowing the Griggs to investigate those assertions through discovery. (R. pp. 33-41).

As the Griggs noted in their motion to compel, their original attempts to investigate Nationstar’s alleged defenses were met with flat refusal by Nationstar to provide the material, absent being compelled by the court to do so. (R. p. 40). It was not until after the Griggs filed their motion to compel that Nationstar became open to resolving the outstanding discovery issues by a consent agreement between the parties.¹

Additionally, the fact that the false negative reporting continued to occur **after** it had been brought to Nationstar’s attention highlights the difference

¹ The parties notified the Court they had reached a consent agreement on the outstanding discovery issues which included a confidentiality order. That order has yet to be submitted to the court, as it was mistakenly not presented at the hearing and the parties have held off submitting it for the court’s approval pending the resolution of the dismissal of the Griggs’ complaint.

between Ross and the present case. The false reporting was not corrected, rather it kept occurring.

The Griggs have alleged that Nationstar's repeatedly reported false negative credit information against them, despite having actual knowledge that such negative credit information was false, has caused injury.

The complaint alleges the following concerning the false negative reporting:

1) FIRST INSTANCE OF FALSE NEGATIVE CREDIT REPORTING:

- a) On or about May 17, 2010, the Plaintiffs became aware of the first instance of false negative credit reporting and immediately brought it to the Defendant's attention, demanding it be corrected. (R. p. 15, ¶ 10).
- b) On or about May 28, 2010, the Plaintiffs once again contacted the Defendant, stressing the need to correct the false negative credit reporting. (R. p. 15, ¶ 12).
- c) On or about June 10, 2010, the Plaintiffs received correspondence from the Defendant informing them that the false negative credit reporting (the first instance) had been corrected. (R. p. 16, ¶ 15). The Plaintiffs confirmed this by running a credit report on or about June 15, 2010. (R. p. 16, ¶16).

2) SECOND INSTANCE OF FALSE NEGATIVE CREDIT REPORTING:

- a. On our about July 16, 2010, the Plaintiffs were informed that a BOA loan they had previously been approved for was being turned down due to false negative credit reporting by the Defendant. (R. p. 17, ¶ 18).
- b. On or about July 19, 2010, Plaintiff Michael Griggs and his boss contacted the Defendant to try to rectify the issues with the false negative credit reporting. They eventually spoke to an agent/employee of the Defendant named "Elliot" who told them he would look in to the matter. (R. p. 17, ¶ 19).

- c. On or about July 28, 2010, Elliot contacted the Plaintiffs and notified them that the Defendant had, for a second time, corrected the false negative credit reporting against the Plaintiffs. (R. p. 17, ¶ 20).

3) THIRD INSTANCE OF FALSE NEGATIVE CREDIT REPORTING:

- a. On or about August 27, 2010, the Plaintiffs once again sought to secure financing with another bank and were denied because the Defendant was falsely reporting negative credit information about the Plaintiffs. (R. p. 18, ¶ 24).
- b. On or about September 8, 2010, the Defendant informed the Plaintiffs that the false negative credit reporting against them had once again been corrected.

Nationstar has previously argued that “nowhere do Plaintiffs allege that Nationstar knowingly reported false information.” (Response to Motion to Alter or Amend) (R. p. 97). The Griggs disagree. The complaint as pled alleges that Nationstar repeatedly reported false negative credit information about them, even when Nationstar had the knowledge that such information was false.

To prove actual malice, the plaintiff must show that the defendant was activated by ill will in what he did, with design to causelessly and wantonly injure the plaintiff; **or that the statements were published with such recklessness as to show a conscious disregard for plaintiff's rights.** Swinton Creek Nursery and James M. Futch v. Edisto Farm Credit, et. al., 334 S.C. 469 at 485; 514 S.E.2d 126 at 134 (1999), emphasis added. Even if the complaint fails to allege Nationstar had knowledge that the information was false, it certainly alleges facts that when taken in the light most favorable to the Griggs show that Nationstar, at a minimum, was so reckless in publishing the statements as to show a conscious

disregard for the Griggs rights. In short, Nationstar was well aware that they were having problems handling the Griggs account and had already falsely reported negative credit information against the Griggs once as of May 17, 2010 and the subsequent correction (R. p.p. 15-16, ¶¶ 10 and 16). The fact that Nationstar continued to subsequently report false negative credit information on the Griggs supports that Nationstar's conduct rises to the level of actual malice as defined in Swinton. **Such actions are not preempted by the Fair Credit Reporting Act as the Defendant claims, as it constitutes actual malice under the law.**

Nationstar has also alleged such instances were "honest mistakes." The trial court's decision to grant judgment on the pleadings and dismiss the Griggs' defamation claim erroneously reversed the standard of review as articulated in Bradshaw, which found "the reviewing Court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Bradshaw at 261; 844. Whether or not the actions or failures to act pled by the Griggs to be defamation were "honest mistakes" or defamation with actual malice is "an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment," making the trial courts granting of judgment on the pleadings error pursuant to Russell. Russell at 89; 339.

The complaint as pled alleges facts sufficient to constitute actual malice. The complaint alleges that Nationstar was promptly notified of the fire loss at which point the Griggs were given a payoff amount and told that their account would be frozen. (R. p. 14, ¶ 5). The complaint alleges that any delay in the

account actually getting paid off was due to errors on behalf of Nationstar. Nationstar objected to the original way the payoff checks were made out, gave the Griggs differing payoff amounts, sent them the wrong payoff statement and then even sent them an additional payoff statement after having received the payoff payment. (R. p. 15, ¶¶ 5-9).

It was not until after all the events in the paragraph above, that the Griggs discovered the false negative credit reporting. This is reporting the Griggs specifically pled was false. (R. p. 15, ¶ 10). It was reporting that was repeated throughout the process despite the facts that Griggs had timely notified Nationstar of the fire loss, been told their account was “frozen” for payoff and had not yet been able to pay off their account due to problems created by Nationstar. Ignoring these facts, Nationstar claims the Griggs were “admittedly in arrears.” (R. p. 96). The Griggs are unable to understand how Nationstar fashions they ever “admitted” to being in arrears. In fact, the Griggs specifically pled in their complaint that later payments they made which Nationstar claimed they were owed were made “under protest...because they knew of no other way to resolve their situation.” (R. p. 18, ¶ 25).

Additionally, there is no evidence to support judgment on the pleadings, as there is no evidence that the false credit reporting was an “honest mistake” or that proper remedial action was taken as there was in Ross. Similarly, the false credit reporting in the present case was not born from “unique” and “complicated” circumstances the Griggs caused. The Griggs were victims of a house fire, an unfortunate but not uncommon occurrence that businesses like Nationstar have to deal with fairly regularly. If Nationstar had in fact maintained “procedures

reasonably adapted to avoid such an error” and “substantially complied with all applicable statutes and regulations,” (see Third and Fourth Affirmative Defenses of Answer) (R. p. 29) there is no logical reason why they would have falsely reported inaccurate credit information against the Griggs, let alone continued to falsely report against the Griggs after having the problem brought to their attention.

The complaint provides allegations, which if taken in a light most favorable to the Griggs creates a material question of fact for a jury as to whether or not Nationstar knew the information they were reporting about the Griggs was false or made with reckless disregard of whether it was false or not. In short, the pleadings allege that Nationstar had knowledge that there was something wrong with the pay off process on the Griggs account and that it was leading to repeated instances of the Griggs falsely being described as delinquent, both internally and with outside credit reporting agencies. While Nationstar claimed to have “fixed” the problem several times, the facts as pled in the complaint show they had not. It was error for the trial court to accept Nationstar’s allegations over the Griggs at this point of the case.

As such, the trial court erred in granting Nationstar’s motion for judgment on the pleadings and dismissing the Griggs’ causes of action for defamation.

B. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN GRANTING NATIONSTAR’S MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSING THE GRIGGS’ CLAIMS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACT.

As the Circuit Courts order noted, to state a viable claim for intentional interference with prospective contract, a plaintiff must plead: (a) intentional

interference with prospective contractual relations; (b) for an improper purpose or by improper methods; and (c) resulting in injury. Crandall Corp. v. Navistar Int'l Transp. Corp., 395 S.E.2d 179 (1990).

The allegations contained in the complaint support that Nationstar's actions and/or failures to act tortiously interfered with the Griggs' prospective contract. As paragraphs twelve (12) and thirteen (13) allege (R., pp. 15-16), Nationstar failed to timely correct the false credit reporting and then "suggested" the Griggs refinance with them. Assuring the Griggs that drafts would be sent out within 48 hours of receiving the packet to refinance, Nationstar instructed the Griggs that it was okay to have their builder start.

The complaint specifically pleads that the Griggs relied on these assurances in starting the construction on their new home. (R. p.p. 15-16, ¶ 13). Later, once their builder had begun construction and once Nationstar was **again** falsely reporting inaccurate information which prohibited the Griggs from securing financing from other lenders, the Griggs **again** accepted the option of refinancing with Nationstar. In doing so, the Griggs specifically pled that they were "**desperate to secure financing since they had already told their builder to begin**" (R. p. 17, ¶ 20). The Griggs also allege that they made payments "**under protest**" because "**they knew of no other way to resolve their situation.**" (R. p. 18, ¶ 25).

Under the allegations contained in the complaint, it is a reasonable conclusion that the Griggs felt **compelled** to refinance their loan through Nationstar due to Nationstar's actions. The Griggs did not consider refinancing with Nationstar until Nationstar suggested refinancing on or about May 28, 2010.

That suggestion was made in response to the Griggs contacting Nationstar to complain about the fact that Nationstar's false negative credit reporting against the Griggs had not yet been corrected. (R. p. 15, ¶¶ 10 and 12). Additionally, this suggestion to refinance came after Nationstar had hindered the Griggs' attempts to pay off their mortgage by supplying the Griggs with inaccurate payoff amounts/statements. (R. p.p. 14-15, ¶¶ 5, 8, 9 and 11). In short, the facts as alleged in the complaint support the Griggs argument that Nationstar created a situation of duress with the Griggs and used that situation to compel them to refinance their loan with Nationstar.

Such allegations, if taken in the light most favorable to the non-movant would certainly support that Nationstar engaged in improper methods pursuant to Santoro v. Schulthess, 384 S.C. 250 (2009). First and foremost, the complaint alleges defamation and negligent misrepresentation against Nationstar.

The complaint also clearly pleads that the Griggs suffered injury. In paragraphs seventeen (17) and twenty-seven (27) of the complaint, the Griggs plead specific monetary loss. (R. p. 16, ¶ 17 and p. 28, ¶ 27) Specifically, the complaint alleges that the Griggs lost a 4.25% loan through another lender and were ultimately forced to refinance at 5.25% with Nationstar.

As the complaint alleges, the Griggs had, at the time of the suggestion to refinance with Nationstar, been without a home for almost a month and half. They had a builder ready to begin and were understandably eager to start construction on their new home. Therefore, the Griggs agreed to refinance with Nationstar under the assurance that within 48 hours of receiving a completed packet, Nationstar would send drafts for funds to the Griggs. The Griggs

specifically asked if they could tell their builder to begin and were told by Nationstar that it was okay to tell the builder to start. Based on these assurances, the Griggs agreed to refinance their loan with Nationstar. (R. p.p. 15-16, ¶ 13).

However, as is pled in the complaint, those assurances made by the Nationstar proved to be false. The refinanced loan was not completed until January 18, 2011. Nationstar has previously argued that since the loan was ultimately completed, the representations made to the Griggs were true. (R. p. 101). This ignores the fact that Nationstar misled the Griggs by telling them they would receive drafts within 48 hours of returning the financing packet to Nationstar. The Griggs specifically pled that they relied on this assurance from Nationstar. (R. p.p. 15-16, ¶ 13). That false representation led the Griggs to extending themselves financially with a builder.

“A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment.” Russell v. Columbia, 305 S.C. 86 (1991) citing Brown v. United Insurance Co. of America, 268 S.C. 254 (1977). “When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment.” *Id.* citing Crowe v. Domestic Loans, Inc., 242 S.C. 310 (1963). “Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever.” *Id.* citing Baldwin v. Sanders, 266 S.C. 394 (1976). “Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties.” *Id.* citing Manning v. Dial, 271 S.C. 79 (1978). “Further, a judgment on the pleading is considered to be a drastic

procedure by our courts.” Id. citing U.S. Casualty Co. v. Hiers, 233 S.C. 333 (1958).

Given the above, the allegations contained within the Complaint constitute “issues[s] of fact... which, if resolved in favor of the plaintiff, would entitle [them] to judgment.” Id. The Court’s decision to dismiss the Plaintiffs’ complaint was a “drastic procedure” that did not construe the pleadings “liberally so that substantial justice [was] done between the parties.” See Id. Therefore, under the appropriate standard, it was error for the Circuit Court to grant Nationstar’s motion of judgment on the pleadings and dismiss the Griggs’ tortious interference with a prospective contract cause of action.

C. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN GRANTING NATIONSTAR’S MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSING THE GRIGGS’ CLAIMS FOR VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

“In order to bring an action under the UTPA, the plaintiff must demonstrate (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest.” Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283 (4th Cir. S.C. 1998).

1. Nationstar acted in an unfair and deceptive manner.

The Griggs’ claims against Nationstar for violation of SCUTPA is rooted in Nationstar’s repetitious employment of deceptive acts or practices. “It is in the public interest generally to prevent the use of false and misleading statements in the conduct of business... and actual deception need not be shown; a finding of a

tendency to deceive and mislead will suffice. And... the Fourth Circuit Court of Appeals held that the requisite capacity to deceive could be found without evidence that anyone was actually deceived.” State ex rel. McLeod v. Brown, 278 S.C. 281 (1982).

The complaint alleges that paragraphs five, nine, eleven through fifteen, twenty through twenty-two, and twenty-four through twenty-six specifically constitute such “deceptive acts in the conduct of trade and commerce” and that each and every allegation or assertion found in paragraphs one through fifty-four are incorporated into the cause of action for violation of the South Carolina Unfair Trade Practices Act. (R. p.23, ¶¶ 55-56). The facts and allegations therein are sufficient to show unfair and deceptive methods used by Nationstar. Such acts include falsely reporting the Griggs to credit agencies for failure to timely pay sums due a minimum of three times and negligently misrepresenting information to induce the Griggs to enter in to a financial agreement.

Additionally, the Griggs have pled allegations that Nationstar created a situation through the false negative reporting and other mishandlings of their account wherein the Griggs were, as a practical matter, coerced in to refinancing their loan with Nationstar.

Construing the facts alleged in the complaint in the light most favorable to the Griggs presents material questions of fact as to whether or not Nationstar has acted in an unfair and deceptive manner.

2. The Griggs suffered actual, ascertainable damages as a result of Nationstar’s use of unlawful trade practices.

As described above, the Griggs have alleged several instances of negative reporting done by Nationstar including instances after the initial correction was made in June 15, 2010. The Griggs also pled that Nationstar repeatedly mishandled their attempts to actually payoff their loan. (R. pp. 14-18, ¶¶ 7-14, 16, 20-25). The Griggs have pled allegations arguing that they were basically forced in to refinancing with Nationstar. The Griggs pled allegations that they were **“desperate to secure financing”** after the false reporting had sabotaged their previously approved loan with Bank of America, paid July and August payments **“under protest”** because they saw no other way to resolve the situation and in an effort to “mitigate their damages” finally refinanced their loan with Nationstar. (R. pp. 16-18, ¶ 17, 18, 20, 25 and 27).

The Griggs have pled that they lost a 4.9% VA Home loan through Bank of America and were forced to refinance at 5.25% with the Defendant, along with paying \$7500.00 in closing costs. (R. pp. 16-18, ¶¶ 17, 18, and 27). The difference in interest rates and the associated costs are actual, ascertainable and significant damages which resulted from the unfair and deceptive acts employed by Nationstar.

3. The unlawful trade practice engaged in by Nationstar is capable of repetition and is therefore impactful on the public interest.

South Carolina law regards the public interest prong of the UTPA inquiry as satisfied by evidence of a potential for repetition of the unfair or deceptive act. Daisy Outdoor Adver. Co. v. Abbot, 322 S.C. 489, 495 (S.C. 1996). Prior case law makes very clear that evidence of a potential for repetition, generally speaking, in and of itself establishes the required public impact. Id. at 496. South

Carolina courts have long held that the ability to illustrate the existence of unfair or deceptive practices capable of repetition satisfies the public impact prong of an UTPA review. In *Daisy*, the South Carolina Supreme Court details instances where private wrongs have been held to negatively impact the public interest due to their potential for repetition. That line of cases begins with Noack Enters., Inc. v. Country Corner Interiors, 290 S.C. 475 (Ct. App. 1986). The Noack Court held that proof of the potential for repetition of a defendant's actions satisfies the public interest requirement of UTPA. *Daisy*, citing Noack at 480.

The sale of mislabeled peach trees and the breach of an express warranty in Haley Nursery Co. v. Forrest, 298 S.C. 520 (S.C.1989), was held to be a violation of the UTPA. *Daisy* at 493-94 citing Haley, (holding that the **potential** for repetition by publication of alleged misrepresentations to consumers satisfied the public interest prong) (emphasis added); the sale of an automobile which included a misrepresentation by seller's agent to buyer, Dowd v. Imperial Chrysler-Plymouth, Inc., 298 S.C. 439 (Ct. App. 1989) (holding that training a salesperson to deceive customers made the potential for repetition in violation of public interest apparent); and the padding of a repair bill in Barnes v. Jones Chevrolet Co., 292 S.C. 607 (Ct. App. 1987) (holding that the padding of a repair bill satisfied the UTPA's public interest requirement because of the potential for repetition that existed). "Noack Enterprises, as well as Haley Nursery, Dowd and Jones Chevrolet, make clear that South Carolina law regards the public interest prong of the UTPA inquiry as satisfied by evidence of a potential for repetition of the unfair or deceptive act." *Daisy* at 495.

The South Carolina Supreme Court has also held that unfair or deceptive acts in the course of business practices that are a direct result of the type of business being transacted satisfies the UTPA's public interest prong. In York v. Conway Ford Inc., 325 S.C. 170 (S.C. 1997), the Plaintiff alleged a violation of the UTPA when he learned that a vehicle which was sold "like new" was damaged in an accident prior to the sale. See York. The Court held that unfair and deceptive practices on the part of the dealer, Conway Ford Inc., were capable of repetition, holding "Conway Ford is in the business of selling cars," and "certainly the alleged acts or practices have the potential for repetition." York at 173.

Nationstar is in the business of providing homeowner loans to finance the purchase or construction of homes in South Carolina. Not only is it clear from the facts alleged in the complaint that Nationstar did repeat acts and/or failures to act which the Griggs allege are unfair and deceptive, but given the nature of the Nationstar's business, these acts and/or failures to act are capable of repetition and impactful on the public interest.

As such, the Circuit Courts order granting Nationstar's motion for judgment on the pleadings and dismissing the Griggs' cause of action for violation of the South Carolina Unfair Trade Practices Act was in error.

D. THE CIRCUIT COURT COMMITTED AN ERROR OF LAW IN GRANTING NATIONSTAR'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSING THE GRIGGS' CLAIMS FOR NEGLIGENT MISREPRESENTATION.

The Griggs' claim for Negligent Misrepresentation is not barred by the FCRA. As argued above, the defamatory actions of Nationstar are not preempted

by the FCRA. Even if the court were to find the defamatory acts were preempted by the FCRA, the allegations concerning the negligent misrepresentation claim arise from more than actions involving false credit reporting. Specifically, the complaint references paragraphs five (5), nine (9), eleven (11) through (15), twenty (20) through twenty-two (22) and twenty-four (24) through twenty-six (26). (R. pp. 14-18). The majority of allegations complained in those paragraphs involve statements, actions and failures to act by Nationstar regarding payoff and refinancing a loan with Nationstar. While there may be some allegations in these paragraphs dealing with false credit reporting, the nature in which the allegations are referenced concerns Nationstar's false statements to the Griggs which led the Griggs to begin construction on their new home and ultimately refinance with Nationstar after Nationstar's actions and/or failures to act had closed other options to the Griggs.

The argument that the complaint does not plead Nationstar had a pecuniary interest or that the Griggs did not suffer pecuniary loss is wrong. Nationstar admits in their answer that the Griggs refinanced a loan for \$187,500.00 at 5.25%, while paying \$7,500.00 in closing costs. (R. p. 27, ¶ 5) The Griggs allege that they lost a 4.9% VA Home Loan through Bank of America and were forced to refinance at the 5.25% rate with Nationstar. (R. pp. 16-18, ¶¶ 17, 18, and 27). Such allegations, when taken in a light most favorable to the Griggs support a specific showing of pecuniary loss by the Griggs.

The Griggs also allege making several payments before that refinancing and after notifying Nationstar of the fire loss and being informed their loan was in "payoff." (R. pp. 14-18, ¶¶ 5-9, 14, 20, 22 and 25). It is axiomatic that Nationstar

enjoyed pecuniary benefits from these payments while the Griggs suffered pecuniary harm. Further, it stands to reason that had Nationstar exercised due care, they would not have continually falsely reported inaccurate credit reporting history against the Griggs, nor would they have instructed the Griggs that they could begin construction while Nationstar continued to show their loan as “under payoff.”

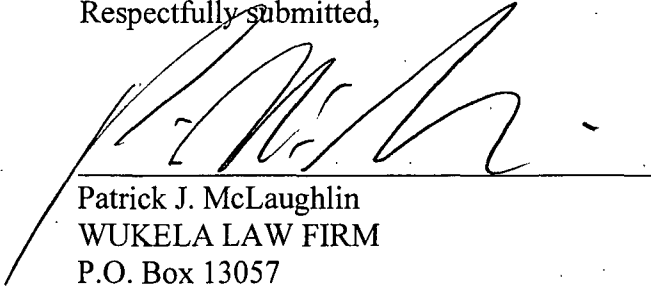
It was error to dismiss their negligent misrepresentation claim before the Griggs even had an opportunity to investigate Nationstar’s claims to have maintained procedures to avoid such errors and their substantial compliance with all applicable statutes and regulations (as claimed in Nationstar’s Third and Fourth Affirmative Defenses) (R. p. 29). Granting judgment on the pleadings at this stage is the Court flipping the standard of review and taking the allegations in the light most favorable to the moving party. The court would, in essence, be saying that since Nationstar alleges they exercised reasonable care they are entitled to judgment on the pleadings. That is not the standard of review.

As such, the Plaintiffs respectfully request that the Court alter or amend its judgment to allow the Plaintiffs to pursue their negligent misrepresentation cause of action.

CONCLUSION

Based on the arguments presented above, the Plaintiffs respectfully request that the Court alter or amend its judgment on the pleadings in favor of the Defendant.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-16-01120

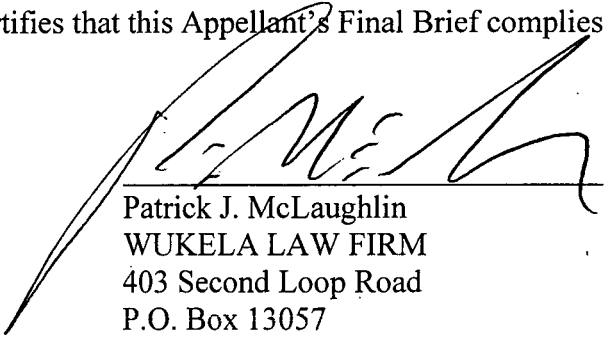
Amanda and Michael Griggs..... Appellant,

v.

Nationstar Mortgage, LLC..... Respondent,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Appellant's Final Brief complies with Rule 211(b), SCACR.



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October 18, 2012

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Honorable Brooks P. Goldsmith

Case No. 2011-CP-16-135

Amanda and Michael Griggs Appellant,

v.

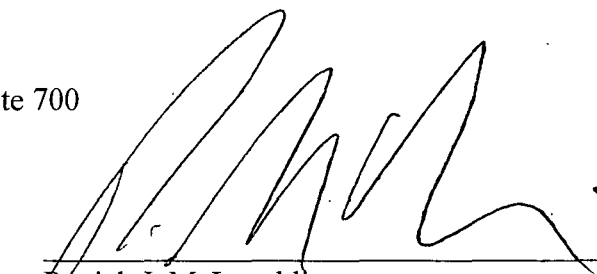
Nationstar Mortgage, LLC, Respondent,

PROOF OF SERVICE

I certify that I have served Appellant's Final Brief on the Respondent by depositing a copy each of it in the U. S. Mail, postage prepaid, on October 18, 2012, to the addresses of counsel of record below:

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