

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.....Appellants,

v.

Nationstar Mortgage, LLC.....Respondent,

FINAL BRIEF OF RESPONDENT

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I. STATEMENT OF ISSUES ON APPEAL

- A. The Circuit Court correctly dismissed Plaintiffs' defamation claim.**
- B. The Circuit Court correctly dismissed Plaintiffs' tortious interference with prospective contract claim.**
- C. The Circuit Court correctly dismissed Plaintiffs' unfair trade practice claim.**
- D. The Circuit Court correctly dismissed Plaintiffs' negligent misrepresentation claim.**

II. INTRODUCTION

Plaintiffs Amanda and Michael Griggs's ("Plaintiffs") Complaint for defamation, tortious interference with prospective contract, unfair and deceptive trade practices, and negligent misrepresentation¹ is based on Plaintiffs' contention that Respondent Nationstar Mortgage LLC ("Nationstar") erroneously reported Plaintiffs' delinquent mortgage payments to credit reporting bureaus. As the Circuit Court correctly found², Plaintiff's defamation and negligent misrepresentation claims are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA") and their remaining claims of tortious interference with prospective contract and unfair trade practices are likewise unsustainable under South Carolina law based upon the facts as pled. Plaintiffs' arguments to the contrary ignore clearly established law and the facts they actually pled in their Complaint. The Circuit Court's Order dismissing Plaintiffs' Complaint should be affirmed

¹ Plaintiffs' Complaint contained numerous claims all of which were dismissed. Plaintiff appeals only the dismissal of the four claims set forth above.

²The Circuit Court relied heavily on two cases that are precisely on point here. See Beattie v. Nationscredit Financial Servs. Credit Corp., 69 Fed. Appx. 585 (4th Cir. 2003) and Ross v. FDIC, 625 F.3d 808 (4th Cir. 2010).

III. STATEMENT OF THE CASE

A. Facts

Taking the allegations pled in Plaintiffs' Complaint as true, the facts are as follows:

Defendant Nationstar holds a mortgage and security deed on Plaintiffs' property. (See R. p.13, ¶ 4). On or about April 15, 2010, Plaintiffs suffered a residential fire. Id. On or about April 16, 2010, Plaintiffs requested a payoff amount from Nationstar for insurance purposes. (R. p.14, ¶ 5). Nationstar provided the payoff amount as of that date, \$182,604.80. Id. On April 23, 2010, Plaintiffs received a check from their insurance company made out to Plaintiffs, 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 Plaintiffs requested the same from their insurance company. Id. Plaintiffs received the payoff check to Nationstar from their insurance company on April 29, 2010, and contacted Nationstar. (R. p.14, ¶ 7). Nationstar agreed to send a payoff statement to Plaintiffs, and requested Plaintiffs return that payoff statement with the payoff check. Id. On May 4, 2010, Plaintiffs received a payoff statement for another loan, apparently mistakenly sent to Plaintiffs by Nationstar. (R. p.14, ¶ 8). Nationstar immediately faxed Plaintiffs the correct payoff amount upon learning of the mistake. (R. p.14, ¶ 9). The new payoff amount, calculated a month after the initial calculation, was \$184,535.50. (R. pp.14-15, ¶ 9). Nationstar requested that Plaintiffs send the payoff check for \$182,604.80 to Nationstar, which Plaintiffs did on May 12, 2010. Id.

On May 17, 2010, Plaintiffs attempted to secure financing for the construction of their new home. (R. p.15, ¶ 10). During their refinancing attempts, Plaintiffs reviewed their credit report and learned that several late payments were reported by Nationstar to

credit bureaus. Id. Plaintiffs contend that these reports were incorrect, and informed Nationstar of their belief. Id.

As Plaintiffs admit in the Complaint, this issue was corrected by Nationstar by June 10, 2010. (R. p. 16, ¶ 15).

On May 28, 2010, apparently unable to secure financing to rebuild their home, Plaintiffs again contacted Nationstar. Nationstar suggested that Plaintiffs could use their insurance payment to finance their new construction instead of using it to pay off their loan to Nationstar. (R. p.15, ¶ 12). Plaintiffs agreed with Nationstar's suggestion, and contacted the appropriate department within Nationstar. Id. At Plaintiffs' request, Nationstar sent Plaintiffs a packet of documents to be completed before Nationstar could release the payoff funds back to Plaintiffs. (R. pp.15-16, ¶ 13). Plaintiffs allegedly asked Nationstar at that time if it "was okay" to have their builder start work on their new home, even though Plaintiffs had no financing or funds to pay the builder. Id. Nationstar allegedly told the Plaintiffs they could have the builder start, but would have to pay the builder any difference between the insurance payoff check proceeds and the final cost of their new home construction. Id. On May 31, 2010, Nationstar informed Plaintiffs that their loan had already been processed for payoff and returning the insurance payoff funds was no longer available. Id.

Plaintiffs contend that they applied for a loan with Bank of America that was denied on July 16, 2010 because of late payment credit history. (R. p.17, ¶ 18). As Plaintiffs admit, when they informed Nationstar of the issue, Nationstar investigated and corrected the credit report. (R. pp.17-18, ¶¶ 19-23). Plaintiffs decided on July 28, 2010 to refinance their home with Nationstar, which they did on September 8, 2010, and to use

the insurance proceeds to rebuild their home. (R. pp.17-18, ¶¶ 20 and 27). After deciding to refinance with Nationstar, Plaintiffs allegedly investigated refinancing their home with an unidentified bank which was denied because of late credit history. (R. p.18, ¶ 24). Plaintiffs reported this to Nationstar and Nationstar once again withdrew the credit report. (R. p. 18, ¶¶ 24 and 26). Accordingly, Plaintiffs received the insurance funds and refinanced their loan with Nationstar rather than using the insurance funds to pay off the loan. (R. p.18, ¶ 27).

B. Procedural Posture

On February 1, 2012, Nationstar filed a South Carolina Rule of Civil Procedure 12(c) Motion for Judgment on the Pleadings and Brief in Support thereof seeking to dismiss all counts of Plaintiff's Complaint. (R. pp.42-60). Plaintiffs filed a response brief on May 2, 2012. (R. pp.61-73). After full briefing, the Circuit Court heard oral argument from the Parties on May 29, 2012. At oral argument, Plaintiffs conceded that Counts Two, Three and Four of their Complaint were due to be dismissed. Those counts are not part of this appeal. After reviewing the briefs and hearing oral argument, the Circuit Court dismissed the remainder of Plaintiff's Complaint on June 7, 2012, by written order on June 7, 2012. (R. pp.2-8).

On June 19, 2012, Plaintiffs moved the Circuit Court to alter or amend its June 7, 2012 Order and to reinstate their claims for defamation (R. pp.78-81), tortious interference with prospective contract (R. pp. 81-84), alleged violations of the South Carolina Unfair Trade Practices Act (R. pp. 84-88), and negligent misrepresentation (R. pp. 88-90). Nationstar filed a responsive brief on July 11, 2012. (R. pp.91-104). The Circuit Court denied Plaintiffs' motion to alter or amend on July 27, 2012. (R. p.9). This appeal followed.

IV. STANDARD OF REVIEW

"The trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint." Foc Lawshe, L.P. v. Int'l Paper Co., 352 S.C. 408, 412-413, 574 S.E.2d 228 (2002) citing Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697 (1987). "The circuit court may dismiss a claim when the defendant demonstrates the plaintiff's failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 122, 634 S.E.2d 5 (2006) (internal punctuation omitted) quoting Foc Lawshe, 352 S.C. at 412. This Court applies the same standard of review as the circuit court upon review. Arata v. Vill. West Owners' Ass'n, 2011 S.C. App. Unpub. LEXIS 430, 3-4 (S.C. Ct. App. June 30, 2011) citing Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245 (2007). Here the facts in the Complaint do not state any viable cause of action and the Complaint was correctly dismissed.

V. ARGUMENT AND CITATION TO AUTHORITY

A. The Circuit Court correctly dismissed Plaintiffs' defamation claim.

State defamation claims are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"). This is black letter law. The applicable provision follows:

No consumer may bring an action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency... except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1681h(e). Nowhere in their Complaint do Plaintiffs expressly plead that Nationstar provided false information to a credit reporting agency with malice or willful

intent to injure Plaintiffs. (R. pp.10-25). Moreover, none of the facts pled in the Complaint could constitute malice or willful intent to injure. Accordingly, FCRA expressly bars Plaintiffs' defamation claim.

As the Circuit Court recognized, two cases which are virtually identical to the present case, Beattie v. Nationscredit Financial Servs. Corp., 69 Fed. Appx. 585 (4th Cir. 2003) and Ross v. FDIC, 625 F.3d 808, 815 (4th Cir. 2010), control the outcome here.

In Ross, a North Carolina plaintiff brought state law defamation, unfair trade practices, and FCRA claims against the holder of her mortgage based on allegedly erroneous credit reporting. Ross, 625 F.3d at 812. The Fourth Circuit held that because the plaintiff failed to present evidence of malice, the defamation claims were preempted, and to hold "otherwise would require us to broaden the definition of 'malice' to include mere negligence, and such a holding would vitiate both the FCRA's statute of limitations and its preemption provision." Ross, 625 F.3d at 810. The same reasoning applies here.

Plaintiffs argue that the Circuit Court "overlooked important distinctions between the present case and Ross." Plaintiffs' entire argument to alter the Court's judgment with respect to their defamation claim is based on one line in the Ross opinion. (R. p.79). The Ross Court noted that the record was "replete with evidence that WaMu made a regrettable but honest mistake [regarding a report to credit agencies] and took action to remedy this error once Ross brought it to WaMu's attention." Ross at 815. Plaintiffs contend this language distinguishes the present case from Ross. Plaintiffs are wrong. Based on Plaintiffs' own pleadings, Nationstar, like the defendant in Ross, took action to remedy any alleged mistakes as soon as they were brought to Nationstar's attention. (See R. pp. 16-18, ¶¶ 15-16, 18, 20, 22-24 and 26). This is precisely the type of "regrettable

but honest mistake” followed by “action to remedy this error” that occurred in the Ross case. Accordingly, Plaintiffs fail to plead malice or intent to harm, or any facts suggesting the same, and their defamation claim are therefore preempted by FCRA. (R. pp.10-25).

Plaintiffs ignore Beattie, which expressly addresses this precise issue under South Carolina law. In Beattie, the plaintiffs contended that Nationscredit erroneously reported their home was in foreclosure. Beattie at 587. The plaintiffs also claimed to have “made repeated attempts, by telephone and in writing, to contact Nationscredit about the status of their account, but they did not receive a response.” Id. Here, Nationstar not only responded to Plaintiffs’ inquiries, it actually changed the relevant credit reports. (See R. pp.16-18, ¶¶ 15, 16, 20, and 26).

The Fourth Circuit held that the Beattie defendant’s actions did not rise to the level of malice because “the report was at least in [the defendant]’s view, accurate.” Beattie at 590-591. The same is true here. Nowhere do Plaintiffs allege that Nationstar knowingly reported false information. This is fatal to their claim. In fact, at least with regard to one such reporting, Plaintiffs admit they missed two payments, and further admit that once these payments were made Nationstar changed the applicable credit report. (See R. p.18, ¶¶ 25-26). According to Plaintiffs’ own pleadings, the credit reporting Nationstar made was accurate “at least in [Nationstar]’s view.” Id. Therefore, as in Beattie, Plaintiffs’ defamation claim is preempted.

Application of Ross and Beattie to the present Complaint should end this inquiry. Yet Plaintiffs’ Brief to this Court raises a new argument for the first time on appeal.³

³ Plaintiffs did not make this argument in the Complaint or in any of their subsequent briefings.

Plaintiffs now argue that they need not affirmatively plead malice or willful intent to injure as 15 U.S.C. § 1681(h) requires, but instead may show malice by alleging “that the statements were published with such *recklessness* as to show a conscious disregard for plaintiff’s rights.” See Plaintiffs’ Brief, p. 8. By not raising the argument below, Plaintiffs have waived it. See State v. Dickman, 341 S.C. 293, 295 (2000) (noting “[an] argument is procedurally barred since it was not raised below”); State v. Addison, 343 S.C. 290, 292 (2000) (same); State v. Huggins, 336 S.C. 200, 203, 534 S.E.2d 268 (1999) (same); Nationwide Mut. Ins. Co. v. Hunt, 327 S.C. 89, 97, 488 S.E.2d 339 (1997) (same).

Although Plaintiffs’ “reckless malice” argument has been waived, it also lacks merit. As set forth above, and as held in Beattie and Ross, the facts pled by Plaintiffs here do not rise to the level of malice or willful intent to injure as required by FCRA. Applying a “reckless malice” test does not change the result. “The test by which a tort is to be characterized as reckless, willful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff’s rights... that at the time of his act or omission to act the tort-feasor be conscious, or chargeable with consciousness, of his wrongdoing.” Rogers v. Florence Printing Co., 233 S.C. 567, 577, 106 S.E.2d 258 (1958). Plaintiffs’ allegations, even if taken as true, do not suggest any wrongdoing, let alone consciousness of wrongdoing by Nationstar. The factual allegations contained in Plaintiffs’ Complaint are as follows:

- Plaintiffs’ home was destroyed by fire on April 15, 2010. (See R. p.13, ¶ 4).

- Plaintiffs do not allege that they made a mortgage payment in May of 2010. (R. pp.10-25).
- Nationstar reported to credit agencies in May of 2010 that Plaintiffs missed one or more payments in 2010 – which based on the facts as pled was true. (R. p.15, ¶ 10).
- Nationstar retracted the May payment reporting in June of 2010. (R. p.16, ¶¶ 15-16).
- Plaintiffs do not allege that they made a mortgage payment in June of 2010. (R. pp.10-25).
- Nationstar reported to credit agencies in July of 2010 that Plaintiffs missed one or more payments in 2010 – again, true based on the allegations of Plaintiffs’ Complaint. (R. p.17, ¶ 18).
- Nationstar again retracted the June payment reporting in July of 2010. (R. p.17, ¶ 20).
- Plaintiffs did not make their mortgage payments for the months of July and August until on or about August 28, 2010, and only then “under protest.” (R. p.18, ¶ 25).
- Nationstar reported these July and August late payments to the credit agencies, but retracted those reports in September of 2010. (R. p.18, ¶ 26).

The facts as pled show that the Plaintiffs did not make their mortgage payments on time, or at all, and Nationstar in good faith reported the same to credit reporting agencies. Moreover, as in Ross, the alleged mistakes regarding the credit reporting were corrected upon notice. (See R. pp. 16-18, ¶¶ 15-16, 18, 20, 22-24 and 26). This cannot be malice or willful intent to injure.

Because Plaintiffs did not plead malice or willful intent to injure and the facts pled would not support such an allegation, FCRA bars Plaintiffs’ defamation claim.

B. The Circuit Court correctly dismissed Plaintiffs' tortious interference with prospective contract claim.

To establish a cause of action for tortious interference with prospective contractual relations, a plaintiff must show: (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., 302 S.C. 265, 395 S.E.2d 179 (1990). Plaintiffs fail to plead all three requirements.

1. Nationstar did not intentionally interfere with Plaintiffs' prospective contract relations.

Nationstar in good faith exercised its legal right to report delinquent payments, and such behavior cannot form the basis of an intentional interference claim. Galliard v. Fleet Mortgage Corporation, 880 F. Supp. 1085, 1089 (D.S.C. 1995) (“A party who in good faith exercises a legal right affords no basis for an action by the second party for intentional interference with contract despite the fact that it may cause a third party not to perform a contract.”). Plaintiffs pled no facts suggesting Nationstar at any time acted in bad faith, and their claims therefore fail as a matter of law.

Further, Nationstar reported Plaintiffs' delinquent payments because those payments were delinquent. Even if Nationstar did *erroneously* report Plaintiffs' delinquencies, Plaintiffs pled no facts suggesting Nationstar knowingly reported inaccurate information, an element they must show according to South Carolina law. “Generally there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party.” United Educational Distributors, LLC v. Educational Testing Service, 564 S.E.2d 324, 328 (2002); see also Santoro v. Schulthess, 384 S.C. 250, 266, 681 S.E.2d 897 (2009)

(noting that to sustain a cause of action for intentional interference with prospective contractual relations plaintiff must show defendant *knowingly* made inaccurate statements). Here, there are no allegations to suggest Nationstar sought to do anything other than report what Nationstar believed to be delinquent account information.

2. Nationstar did not utilize improper methods.

Reporting delinquent payments to a credit bureau – even if the report is erroneous – is not an “improper method” for purposes of interference with prospective contractual relations claims under South Carolina law. Recognized methods of improper interference in South Carolina include:

- those means that are illegal or independently tortious;
- violence;
- threats or intimidation;
- bribery;
- unfounded litigation;
- fraud, misrepresentation, or deceit;
- defamation;
- duress;
- undue influence;
- misuse of inside or confidential information;
- breach of a fiduciary relationship;
- violation of established standard of trade or a profession;
- unethical conduct; or
- sharp dealing, overreaching, or unfair competition.

Santoro, 384 S.C. at 266 (2009) (citing Love v. Gamble, 316 S.C. 203, 448 S.E.2d 876 (1994)). Reporting delinquent payments to credit bureaus does not fall into any of the categories listed above. Plaintiffs make no allegations that Nationstar engaged in violence, threats of intimidation, bribery, unfounded litigation, duress, undue influence, misuse of confidential information, breach of fiduciary relationship, violation of established trade practice, unethical conduct, sharp dealing, overreaching, fraud, or unfair competition. Plaintiffs' allegations that Nationstar's credit reporting falls under either of the two remaining possibilities, illegal or tortious behavior or defamation, is unfounded.

Moreover, the Fourth Circuit in Beattie expressly found that that the "means" Plaintiffs allege Nationstar employed, e.g. credit reporting, are not independently illegal or tortious under South Carolina law. See Beattie, 69 Fed. Appx. at 589 (noting that reporting delinquent accounts to credit bureaus—even erroneously—violates no common law, legislative enactments, or constitutional provisions under South Carolina or federal law). As the Circuit Court properly found, the action Plaintiffs contend that Nationstar engaged in, improper credit reporting, is not a recognized "improper method" that will support a claim for intentional interference with prospective contract. Id. Plaintiffs do not address this point, and it is fatal to their claims.

Plaintiffs argue that their tortious interference with prospective contract claim should survive because Nationstar "created a situation of duress with the Griggs and used that situation to compel them to refinance their loan with Nationstar." See Plaintiffs' Brief, p. 13. This makes little sense. Nothing pled by Plaintiffs would qualify as duress under South Carolina law. "A party is under duress if improper external pressure or influence . . . practically destroys the free agency of a party and causes him to do an act

or form a contract not of his own volition. Moreover, duress is viewed with a subjective test which looks at the individual characteristics of the person allegedly influenced, and duress does not occur if the victim has a reasonable alternative to succumbing and fails to take advantage of it.” Blejski v. Blejski, 325 S.C. 491, 498, 480 S.E.2d 462 (1997) (internal punctuation and citations omitted). Plaintiffs have not pled this here.

Plaintiffs were not “forced” to do anything. They could have used their insurance proceeds to pay off Nationstar, rebuild their home (which they did), or do some other thing. Had Plaintiffs used the insurance policy for a purpose other than to pay off their Nationstar loan, they could have simply continued under the existing loan agreement or refinance their loan—as they opted to do with Nationstar. The fact that Plaintiffs were turned down for a loan with a certain set of terms at Bank of America does not mean Plaintiffs had no other reasonable alternative to refinancing with Nationstar or that they had to refinance their loan with Nationstar at all. The actions alleged by Plaintiffs certainly did not “practically destroy the free agency of [Plaintiffs]” as required by South Carolina law.

Moreover, Plaintiffs do not plead the required elements of economic duress:

(1) the coerced party must show that he has been the victim of a wrongful or unlawful act or threat, (2) such act or threat must be one which deprives the victim of his unfettered will, (3) as a direct result the coerced party must be compelled to make a disproportionate exchange of values or give up something for nothing, (4) the payment or exchange must be made solely for the purposes of protecting the coerced party's business or property interests, and (5) the coerced party must have no adequate legal remedy.

Troutman v. Facetglas, Inc., 281 S.C. 598, 316 S.E.2d 424 (1984).

Plaintiffs have not pled that Nationstar threatened them in any way, nor have they ever asserted that Nationstar committed an unlawful act, because they cannot. At the end

of the day, the Complaint simply alleges improper credit reporting, and under South Carolina law improper credit reporting *still* cannot form the basis of an intentional interference with prospective contract claim. Beattie is squarely on point, and credit reporting—even erroneous credit reporting—is not an “improper method” as a matter of South Carolina law. Plaintiffs’ intentional interference with prospective contracts claim was correctly dismissed.

3. Nationstar’s actions caused no injury to Plaintiffs.

To state an intentional interference with prospective contracts claim “usually require[s] the aggrieved party to have been unsuccessful in acquiring an expected contract due to a third party’s intentional and wrongful actions.” Id (quoting Egrets Pointe Townhouses Prop. Owners Ass’n v. Fairfield Cmtys., Inc., 870 F. Supp. 110, 116 (D.S.C. 1994)). As discussed above, Nationstar’s actions were not intentional or wrongful. Moreover, Plaintiffs’ claims fail because defendant’s actions—even if wrongful—caused no harm to Plaintiffs. “A claim for prospective interference cannot stand where the plaintiff is able to consummate a contract with another party.” BCD LLC v. BMW Manufacturing Company LLC, 360 Fed. Appx. 428, 435 (4th Cir. 2010). Plaintiffs consummated a new contract with Nationstar, and therefore suffered no damages. Id.

C. The Circuit Court correctly dismissed Plaintiffs’ unfair trade practice claim.

“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, 291 (4th Cir. 1998) (citing S.C. Code Ann. § 39-5-140); Daisy Outdoor Advertising Co., Inc. v. Abbott, 322 S.C. 489, 473 S.E.2d 47 (1996)).

As set forth in Beattie, credit reporting is not an “unlawful trade practice” for the purposes of the South Carolina Unfair Trade Practices Act (“SCUPTA”). In Beattie, NationsCredit mistakenly sent the plaintiff’s loan to its “internal foreclosure department,” and consequently reported negatively on plaintiff’s credit report. Id. at 587. Plaintiff brought a claim under the SCUPTA alleging that “NationsCredit engaged in unlawful trade practice by falsely reporting to credit bureaus that their mortgage was in foreclosure,” and alleged that plaintiffs were denied credit based on this false reporting. Id. The Fourth Circuit noted that under South Carolina law a trade practice is “unfair when it is offensive to public policy or when it is immoral, unethical, or oppressive,” and defined public policy as the policy “created by applicable common law determinations, legislative enactments or constitutional provisions.” Id. at 588 (internal punctuation and citations omitted). The Fourth Circuit held that the negative credit reporting “cannot be seen as immoral, unethical or oppressive... [and] it is not wholly unreasonable for NationsCredit to believe... that reference of the defaulted loan to its internal foreclosure department had placed the account ‘in foreclosure.’” Id. at 589.

Turning to whether NationsCredit’s actions violated public policy, the Fourth Circuit specifically analyzed the provisions of the Fair Credit Reporting Act. Id. The Court identified one potentially applicable provision, 15 U.S.C. § 1681s-2(a)(1)(A). That provision states that a supplier of information to a credit bureau “shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows

or consciously avoids knowing that the information is inaccurate.” The Fourth Circuit held, however, that § 1681s-2(a)(1)(A) may be enforced only by federal and state agencies and officials, and does not provide a private right of action. Id. The Beattie plaintiff therefore failed to state a claim under SCUTPA. Id. Because negative credit reporting does not constitute an “unlawful trade practice” under South Carolina law, the claims asserted in Beattie, and the claims asserted in this case, fail as a matter of law. Id.

To state a claim under SCUTPA, in addition to showing an unfair act and damages caused by that act, Plaintiffs must allege “facts demonstrating that these acts or practices adversely affect the public.” Noack Enterprises, Inc. v. Country Corner Interiors, 290 S.C. 475, 480, 351 S.E.2d 347 (1986). “This adverse effect on the public must be proved by *specific facts*.” Jefferies v. Phillips, 316 S.C. 523, 451 S.E.2d 21 (1994) (emphasis added). “Without proof of specific facts disclosing that ... members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a speculative [claim] of adverse public impact and that will not suffice for a recovery under the UPTA.” Id. at 527 (citing Daisey Outdoor Advertising Co. v. Abbott, 322 S.C. 489, 473 S.E.2d 47 (1996)) (brackets in original).

Simply reciting that the alleged negative credit reporting is “offensive to public policy and capable of repetition,” fails to satisfy Noack’s requirements. Columbia East Assoc. v. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259 (1989) (holding that alleging unfair acts impact the public interest was not enough to sustain a claim under SCUTPA without evidentiary support). Plaintiffs here do not allege any other instances where the public was allegedly harmed by any alleged practice of Nationstar. For this reason as well, Plaintiffs’ SCUPTA claim was properly dismissed.

D. The Circuit Court correctly dismissed Plaintiffs' negligent misrepresentation claim.

Plaintiffs' negligent misrepresentation claim is preempted⁴ by FCRA for the same reasons their defamation claim is preempted. See Section IV(A) *supra*. The Circuit Court appropriately dismissed it based on established law.

Plaintiffs nevertheless claim that, "Nationstar's false statements to the Griggs which led the Griggs to begin construction of their new home and ultimately refinance with Nationstar after Nationstar's actions and/or failures to act closed other options to the Griggs." See Plaintiffs' Brief, p. 20. This argument is specious.

The only "other options" Plaintiffs allege were closed to them in the Complaint are Plaintiffs' alleged efforts to refinance their debt with banks other than Nationstar. Plaintiffs claim that two other banks turned down their loan applications "because of the late payment history being reported by Defendant Nationstar," and "because Defendant Nationstar was falsely reporting late payments against the Plaintiffs credit history." (See R. pp.17-18, ¶¶ 18 and 24). These claims by their very terms arise from credit reporting and are thus preempted.

Plaintiffs' last-ditch effort to save their Complaint is to argue that when Nationstar informed Plaintiffs that they had the option of using their insurance payment to finance their new construction instead of paying off their debt to Nationstar, this somehow rose to actionable negligent misrepresentation. This argument makes little

⁴ 15 U.S.C. § 1681h(e) provides:

No consumer may bring an action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency... except as to false information furnished with malice or willful intent to injure such consumer.

sense. Plaintiffs do not allege that Nationstar did not send their insurance payment back to them to pay their builder, or that they were unable to pay their builder. The Complaint acknowledges that Plaintiffs did receive insurance funds to pay their builder, and that they did in fact pay him from those funds. (See R. pp.17-18, ¶¶ 20 and 27). Having used those funds to pay the builder, Plaintiffs refinanced their debt with Nationstar, as alleged in the Complaint. (See R. p.18, ¶ 27). Plaintiffs could *and in fact did* use their insurance payment to pay for their new construction, so Nationstar's representation was true. Without a false representation, Plaintiffs' claim for negligent misrepresentation fails. Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676 (2001).

Even if Plaintiffs had pleaded an actionable misrepresentation, which they did not, Plaintiffs' claim also fails because any duty Nationstar owed Plaintiffs arose from the agreement between the parties. When the duty between parties stems solely from a contractual relationship, as here, a negligent misrepresentation claim must fail:

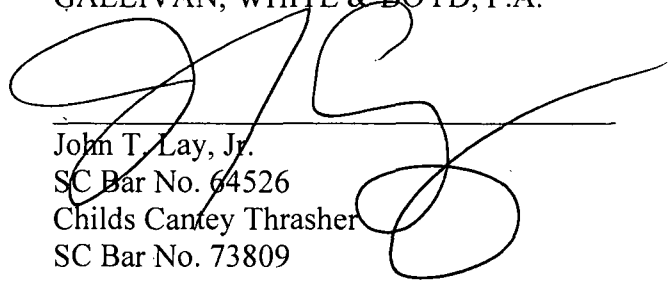
As a matter of law, if the duty owed arises merely from the agreement of the parties, breach of the duty does not create a cause of action for negligent conduct. Where the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.

Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 366, 376, 404 S.E. 2d 912 (1991) (dismissing a negligent misrepresentation claim where duties regarding representations arose contractually). Plaintiffs did not plead that Nationstar owed Plaintiffs a duty arising from any source other than the contract between the parties. Beattie, 69 Fed. Appx. 585 (upholding grant of summary judgment as to negligence claim based on improper credit reporting because Plaintiffs failed to identify a duty owed by their bank other than one arising from the agreement between the parties). Plaintiffs' negligent misrepresentation claim, therefore, fails for this same reason.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the Circuit Court.

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October 31, 2012

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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 Appellants,
v.
Nationstar Mortgage, LLC..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent** on Amanda and Michael Griggs by depositing a copy of it in the United States Mail, postage prepaid, on October 31, 2012, addressed to their attorney of record Patrick J. McLaughlin, Wukela Law Firm, Post Office Box 13057, Florence, SC 29504-3057.

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