THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2009-CP-23-11051

CitiMortgage, Inc., ... Respondent,

v.

William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith, ... Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal surrounds events occurring years after a final judgment was entered with respect to the foreclosure of a mortgage covering real property owned by Appellants William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith ("Appellants"). Specifically, Appellants contend that the South Carolina Supreme Court Administrative Order No. 2011-05-02-01 (the "Administrative Order") allows them to file an Answer and Counterclaim years after they defaulted in the foreclosure action and without having to obtain relief from the default judgment pursuant to the South Carolina Rules of Civil Procedure. Because a plain reading of the Administrative Order refutes this position entirely, Respondent CitiMortgage, Inc. ("Respondent") respectfully requests that this Court affirm the lower court ruling striking the answer and dismissing the counterclaims.

A. Foreclosure Action and Default.

The start of this litigation dates back three years to December 30, 2009, when CitiMortgage filed and served the Summons and Complaint for foreclosure on Appellants. *See generally* Summons, Compl., & Aff. of Service. The Complaint for foreclosure was filed after Appellants defaulted on their payment obligations on a $200,000.00 Note secured by a Mortgage on real property known as 2812 Brushy Creek Road, Greer, SC 29650. *See* J. of Foreclosure & Sale at p.7. Appellants acknowledge that they were properly served with the Summons and Complaint and admittedly failed to make an appearance or serve a responsive pleading within the thirty (30) days provided by the South Carolina Rules of Civil Procedure. *See* Hr'g Transcript 2:1–3:14; Mem. in Opposition to Mot. to Strike, Dismiss and for J. on the Pleadings at p.1 ("At issue in this case is whether the May 2, 2011 Order permits a defendant to respond or otherwise

answer a foreclosure complaint after the 30 day default period to answer has expired."). Due to Appellants' failure to appear or defend against the Complaint for foreclosure, a default Judgment was entered on April 27, 2010. *See* J. of Foreclosure & Sale at p.1 ¶ 4.

Following entry of the Judgment, the property was to be "sold at public auction at the Greenville County Courthouse." *Id.* at ¶ 26. In this case, the property was sold on June 7, 2010. However, just in advance of the sale, Appellants and CitiMortgage began settlement negotiations in an effort to forego the sale. Due to these settlement negotiations, the Master in Equity entered an Order on July 1, 2010, setting aside the sale, but keeping the Judgment intact. *See* 7/1/10 Order, filed on 7/6/10. At no time did Appellants seek to set aside the default judgment. *See* Hr'g Transcript 5:10–13.

B. Administrative Order and Late-Filed Answer.

During the parties' settlement negotiations, the South Carolina Supreme Court issued the Administrative Order on foreclosure intervention. The Administrative Order applies to both pending foreclosure actions as of May 9, 2011, and those filed after that date. In either instance, once the Notice of Rights is served, and the borrower elects participation, the case is "stayed until completion of [] foreclosure intervention." S.C. Admin. Order No. 2011-05-02-01, Sec. B. Here, Appellants were served with the required Notice of Rights on November 7, 2011. *See* Not. of Right to Foreclosure Intervention. Once they requested participation, CitiMortgage filed an Order removing the case from the active docket. *See* 12/14/11 Order Removing Case from Docket.

When a resolution could not be reached as to the foreclosure intervention efforts, CitiMortgage's foreclosure counsel filed an Attorney Certification on April 4, 2012, which lifted the stay of the litigation. *See* Atty. Certification of Compliance. Again, at

that time, Appellants did not obtain or seek relief from the Judgment entered on April 27, 2010. Instead of obtaining relief from the Judgment, Appellants filed an Answer and Counterclaim on May 3, 2012—years too late—asserting three affirmative defenses and two counterclaims. *See generally,* Ans. & Countercl. The two counterclaims asserted were for: (1) unauthorized practice of law in relation to a loan modification and (2) alleged violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). *See id.* at ¶¶ 26–34. In response to the Answer and Counterclaim, CitiMortgage served its Motion to Strike, Dismiss and for Judgment on the Pleadings (the "Motion") on June 1, 2012. *See* Mot. to Strike, Dismiss and for J. on the Pleadings.

In the Motion, CitiMortgage argued that the answer and the compulsory counterclaims were untimely under the South Carolina Rules of Civil Procedure and, on that basis, must be stricken. The basis for this argument was that the Complaint was served on December 30, 2009, and the Answer and Counterclaim was not filed until May 3, 2012. *See id.* at ¶¶ 1–8; *see also* Mem. in Support. In addition to the compulsory counterclaims being untimely, CitiMortgage also argued that the two claims failed as a matter of law. First, as for the unauthorized practice of law counterclaim and the SCUTPA claims, which stems from those same allegations, CitiMortgage argued that South Carolina law does not provide a private right of action for Appellants. *See id.* at ¶ 9; *see also* Hr'g Transcript 18:15–18 ("By the Court: All right, now, Ms. Swing, does the Unfair Trade Practices claim swing or grow out of the unauthorized practice of law? Ms. Swing: Yes, Your Honor, it does."). Second, CitiMortgage argued that both claims, assuming the trial court find a private right of action exists for the unauthorized practice of law—which it did not, were barred by a three-year statute of limitations. *See* Mot. to

Strike, Dismiss and for J. on the Pleadings at ¶ 10. In the Answer and Counterclaim, Appellants argued that the alleged unauthorized practice of law related to a loan modification dated April 1, 2009. *See* Ans. & Countercl. at ¶¶ 27, 30. Thus, any claim related thereto was required to be asserted by April 1, 2012. The May 3, 2012 date was beyond the statute of limitations period. Based on those two bases, CitiMortgage sought dismissal of the counterclaims pursuant to Rules 12(b) and (c).

C. Hearing, Ruling, and Appeal.

A hearing on CitiMortgage's Motion was held before the Honorable Charles B. Simmons, Jr. on July 12, 2012, with both parties appearing through their respective counsel. Prior to the hearing, CitiMortgage submitted a Memorandum in Support of the Motion further describing that the answer was untimely, the counterclaims were compulsory and untimely, and that the counterclaims were subject to dismissal due to there being no private right of action and the running of the statute of limitations. *See generally,* Mem. in Support of Mot. to Strike, Dismiss and for J. on the Pleadings. Appellants similarly submitted a Memorandum in Opposition arguing many of the same issues that form the subject of this appeal. *See generally,* Mem. in Opposition to Mot.

During the hearing on July 12, 2012, Judge Simmons granted the Motion with respect to the two counterclaims, finding that there is no private right of action for the unauthorized practice of law, the factual allegations related to a 2009 loan modification do not give rise to the unauthorized practice of law, and that the SCUTPA claim is barred by the statute of limitations. The timeliness issue and interpretation of the Administrative Order were taken under advisement. *See* Hr'g Transcript 19:14–24. On July 19, 2012, Judge Simmons informed the parties via email that he was ruling in favor of

CitiMortgage on the timeliness question. *See* 7/19/12 Email from Judge Simmons requesting Proposed Order. At that time, counsel for Defendants raised the "waiver" question in relation to a letter from CitiMortgage's foreclosure counsel and Judge Simmons determined it was not sufficient to give rise to a waiver under South Carolina law. *See* 7/19/12 Emails regarding Waiver Ruling. The Order granting CitiMortgage's Motion was filed on August 8, 2012. *See* 8/8/12 Order Granting Mot. Following the entry of the Order, Appellants did not file a Motion to Reconsider and, instead, served their Notice of Appeal on September 5, 2012.

In Appellants' Initial Brief served on October 17, 2012, they identified two issues on appeal related to the timeliness of their answer, but, as outlined below, only one is properly preserved for appellate review. Further, because Judge Simmons correctly ruled in favor of CitiMortgage on the arguments preserved for appeal, CitiMortgage respectfully requests that this Court affirm the lower court's ruling in its Order filed on August 8, 2012.

ARGUMENTS

In this appeal, Appellants state two issues for review in accordance with South Carolina Appellate Court Rules: (1) Did Judge Simmons err in ruling the Administrative Order did not grant Appellants the right to submit an answer after the default period had expired? and (2) Did Judge Simmons err in considering the letter from the Director of Court Administration dated June 7, 2011 in reaching his ruling? Accordingly, only the timeliness of Appellants' answer, served almost three years after their default and a judgment issued against them, is at issue on appeal. *See* S.C. App. R. 208(b) ("Ordinarily, no point will be considered which is not set forth in the statement of the

issues on appeal."). This Court should affirm the trial court's ruling because Judge Simmons properly struck Appellants' answer as untimely Appellants have failed to file a motion to set aside the default judgment entered in 2010, as required by the South Carolina Rules of Civil Procedure. Additionally, the second issue is not preserved for appellate review. If the Court decides to consider Appellants' second issue then the Court should find it does not serve as a ground for reversal because the letter from Court Administration was properly considered as relevant secondary authority. Each of these arguments is discussed, at length, below.

I. APPELLANTS FAILED TO PRESERVE THE SECOND ISSUE FOR APPELLATE REVIEW.

In Appellants' Initial Brief, they present two issues on appeal. *See* Apps. Initial Br. at p.1. The first issue relates to whether Judge Simmons erred in ruling that the Administrative Order does not grant Appellants the right to submit an Answer following their default and a Judgment of Default entered against them. This issue was argued and briefed by both parties and addressed in the August 8, 2012 Order. However, the second issue, which relates to Appellants' arguments that the letter from the Director of Court Administration dated June 7, 2011, is both irrelevant and hearsay, is not preserved for appellate review. When an issue is not preserved for appellate review, it cannot be considered by this Court and cannot serve as a ground for reversal of the lower court's ruling.

"Preserving issues for appellate review is a fundamental component of appellate practice." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001). The error preservation rules definitively require two criteria to be met before an issue is preserved for appellate review: (1) raise the issue to the circuit court, and (2) obtain a

ruling on the issue from the circuit court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000). Accordingly, the litigant must specifically raise the issue and also obtain a ruling on that issue from the circuit court. *See, e.g., Wilke*, 330 S.C. at 76, 497 S.E.2d at 733. If the circuit court does not rule on the specific issue, it is incumbent on the losing party to file a Rule 59 motion, which requests a ruling from the circuit court on that specific issue that was left unaddressed. *See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Grp.*, 347 S.C. 333, 343, 554 S.E.2d 870, 876 (Ct. App. 2001). Failure to follow the explicit rules renders the issue not preserved for appeal.

In this matter, the Order granting summary judgment in favor of CitiMortgage did not address Appellants' arguments related to relevance and hearsay. During the hearing and now, Appellants argue that the letter is both irrelevant and hearsay and, therefore, served as an improper basis for Judge Simmons's ruling. Hr'g Transcript 6:19–21 ("If the Plaintiff's position is that it's going to be providing the Chief Justice's opinion, then I think that's hearsay."); *see also* Apps. Initial Br. at pp. 6–10. However, Judge Simmons did not issue a ruling on whether the letter was relevant to the subject of the lawsuit or whether it constituted hearsay for purposes of this litigation. In reviewing the August 8, 2012 Order, it clearly does not address or rule on Appellants' hearsay or relevance arguments raised during the hearing. *See* 8/8/12 Order Granting Mot. Because these arguments were not ruled upon by Judge Simmons in his Order, Appellants were obligated to file a motion to reconsider and request a ruling on these issues in order to preserve them for appeal. *See, e.g., Ringer v. Graham*, 293 S.C. 238, 245, 359 S.E.2d 523, 526 (Ct. App. 1987) (noting that it was "incumbent on the [Appellants] to present

the issue to the trial court under Rule 59(e)" and failure to do so resulted in the issue not being "properly preserved"); *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 623, 698 S.E.2d 879, 885 (Ct. App. 2010). Appellants did not file a motion to reconsider and, instead, served the Notice of Appeal. *See* Not. of Appeal. Thus, because the hearsay and relevance arguments were raised, but not ruled upon, the second issue is not preserved for appeal.

II. APPELLANTS FAILED TO APPEAL THE TRIAL COURT'S RULINGS ON THE DISMISSAL/JUDGMENT ON THE PLEADINGS AS TO THE TWO COUNTERCLAIMS AND THE INTENT OF THE ADMINISTRATIVE ORDER BEING MET AND, THEREFORE, THOSE RULINGS CONSTITUTE THE LAW OF THE CASE.

In addition to failing to preserve the second issue for appellate review, Appellants have abandoned the arguments underlying the dismissal and judgment on the pleadings as to the counterclaims, making those rulings the law of the case. Appellants have also failed to appeal Judge Simmons's holding that the "intent of the Administrative Order has been fully complied with in this case," thus making it also the law of the case. 8/8/12 Order Granting Mot. at ¶ 19. As noted above, Appellants presented only two issues for appellate review, both of which relate to the interpretation of the Administrative Order and the timeliness of the answer and counterclaim. *See* Apps. Initial Br. at p.1. However, Judge Simmons's Order dismissed and granted judgment on the pleadings as to the counterclaims for two additional reasons beyond their lack of timeliness: (1) no private right of action/no unauthorized practice of law and (2) statute of limitations. *See* 8/8/12 Order Granting Mot. at ¶¶ 22–24. Further, Judge Simmons found the purpose and

intent of the Administrative Order fully complied with in this case. *See id.* at ¶ 19. Having failed to appeal these rulings, they are the law of the case.[1]

"It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *First Union Nat'l Bank v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). The rule is well-established:

> Failure to challenge the ruling is ***an abandonment*** of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.

Id. (emphasis added); *see also Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 692 (2010) ("Fund failed to appeal the single commissioner's finding to the full commission; thus, it is the law of the case."); *Robinson v. Estate of Harris*, 388 S.C. 630, 641 n.8, 698 S.E.2d 222, 228 n.8 (2010) ("Petitioners, however, failed to raise any arguments in their petition for rehearing or initial brief to this Court regarding the circuit court's ruling as to the doctrine of laches. Accordingly, we find the doctrine of laches is the law of the case and this Court is justified in affirming on that basis."). Therefore, Appellants' failure to appeal the rulings as to the dismissal and judgment on the pleadings of the counterclaims and the purpose and intent of the Administrative Order having been satisfied means that they stand as the law of the case.

Based on the foregoing, even if this Court finds that the answer was timely—which CitiMortgage vehemently disputes as outlined in further detail below—the dismissal of the counterclaims and full compliance with the intent of the Administrative Order is the law of the case, making further review unnecessary. *See Dreher v. Dreher*,

[1] CitiMortgage notes that even at the hearing Appellants conceded that if the answer was found untimely, that ended the analysis in favor of CitiMortgage. *See* Hr'g Transcript 14:2–10.

370 S.C. 75, 78 n.1, 634 S.E.2d 646, 647 n.1 (2006) (noting that an "unappealed ruling is the law of the case").

III. THE TRIAL COURT PROPERLY RULED THAT THE ADMINISTRATIVE ORDER DOES NOT SET ASIDE APPELLANTS' DEFAULT AND, THEREFORE, THEIR ANSWER REMAINED UNTIMELY.

The first issue on appeal—and the only issue preserved for appellate review—addresses whether Judge Simmons correctly ruled that the Administrative Order does not give Appellants the right to submit an answer following their default and the issuance of a judgment against them. *See* Apps. Initial Br. at p.1, 3–6. Essentially, Appellants argue that the plain language of the Administrative Order vacates all judgments previously entered and allows a party to assert an answer any time following completion of foreclosure intervention. This is not and cannot be the case, as properly ruled by Judge Simmons. Accordingly, this Court should affirm the ruling of the lower court striking the answer served years after Appellants' default.

A. Because the Administrative Order does Not Vacate Default Judgments, It Only Allows an Answer Where a Party is Not in Default at the Time the Certification is Filed.

As correctly indicated by Appellants, Judge Simmons ruled that the Administrative Order does not resurrect the rights of a defaulting party and, therefore, the answer filed by Appellants remained untimely. *See* 8/8/12 Order Granting Mot. at ¶¶ 15–17. Because this is a proper interpretation of the Administrative Order, when viewed and considered in its entirety, this Court should affirm that ruling.

First, looking to the purpose of the Administrative Order, which Judge Simmons ruled was met in this case, serves as helpful guidance in reaching this conclusion. *See* 8/8/12 Order Granting Mot. at ¶ 19 ("[T]his Court finds that with the exhaustive efforts

that have taken place between the time the first sale was vacated on June 7, 2010, and the date Plaintiff's foreclosure counsel certified compliance with the Administrative Order on April 3, 2012, the intent of the Administrative Order has been fully complied with in this case."). Specifically, nowhere in the outlined purpose does the Administrative Order contemplate vacating prior judgments, and certainly not default judgments. The Administrative Order was designed to create a uniform system for handling loss mitigation efforts once a foreclosure action is filed and to ensure that "mortgage foreclosure actions are not unnecessarily ***dismissed, delayed or inappropriately concluded*** while loan modification or other loss mitigation efforts are being pursued." S.C. Admin. Order No. 2011-05-02-01, Intro. (emphasis added). Thus, the clear purpose is only to ensure that the loss mitigation review process is complete prior to the foreclosure proceeding to sale of the property, should the loss mitigation process not result in a modification, short sale, or deed-in-lieu.[2] Nowhere, does it state that all parties, even defaulting parties who have a judgment entered against them, are now entitled to essentially re-start the foreclosure action and resurrect their litigation rights that they chose to squander. Thus, a reading of the purpose alone supports Judge Simmons's ruling.

Second, reading the Administrative Order in its entirety, including the plain language of Subsection (B)(1), it fails to even contemplate vacating judgments or setting aside defaults. As outlined above, Appellants were properly served with the Complaint on December 30, 2009—almost three years prior to the issuance of the Administrative

[2] CitiMortgage notes that these are three common means of loss mitigation and generally fall within the definition of "foreclosure intervention" as provided by Section A(5) of the Administrative Order. *See* Admin. Order No. 2011-05-02-01(A)(5) (defining foreclosure intervention as "any policy, process or procedure employed by a Mortgagee for the purpose of seeking a resolution of a foreclosure action by loan modification or other means of loss mitigation").

Order. There is no question that, at that time, Appellants were obligated, pursuant to Rule 12(a), of the South Carolina Rules of Civil Procedure, to serve their answer and counterclaim within thirty days. *See* S.C. R. Civ. P. 12(a) (allowing "30 days after service of the complaint upon [them]," to file an answer); 13(a) (requiring them to "state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party"). Appellants did not appear, answer or otherwise respond by the January 29, 2010 deadline and, therefore, were in default pursuant to the South Carolina Rules of Civil Procedure. *See* S.C. R. Civ. P. 55; *see also* J. of Foreclosure & Sale at p.1 ¶ 4 ("The Defendant(s) William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith are in default as shown by affidavit or order filed herein."). At any point thereafter, in order to set aside the default judgment, Appellants had to obtain relief from the court, by way of motion, pursuant to Rule 60.[3] The Administrative Order does not change that result, either expressly or impliedly. *See Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989) (noting that "the ancient maxim that 'equity aids the vigilant and diligent' operates to deprive [the party] of any possible relief in equity"); *Hemingway v. Mention*, 228 S.C. 211, 217, 89 S.E.2d 369, 372 (1955) (noting the long-recognized maxim that "[e]quity aids the vigilant, not those who slumber on their rights").

Not once does the Administrative Order state that all foreclosure judgments entered prior to May 9, 2011, are set aside. Instead, it contemplates foreclosure

[3] Appellants, to date, have never filed a motion for relief from judgment pursuant to Rule 60(b). *See* S.C. R. Civ. P. 55(c) ("For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."). Instead, they filed the late answer in a failed attempt to resurrect their rights. Even if Appellants had argued that their late-filed answer served as a motion pursuant to Rule 60(b), which they did not, they could not satisfy the Rule 60(b) standard for setting aside the default judgment.

judgments being in place when it states that foreclosure intervention must be completed before any merits hearing in the case ***or*** "before any foreclosure sale," if an order of foreclosure has already been entered. *See* S.C. Admin. Order No. 2011-05-02-01, Sec. B(1). As Judge Simmons ruled, "subsection B(1)(e), does not override Rules 55 and 60 of the South Carolina Rules of Civil Procedure and, therefore, [Appellants'] answer was not tolled in this case." 8/8/12 Order Granting Mot. at ¶ 18. Based on the foregoing, the plain terms of the Administrative Order do not override the mechanisms outlined by the South Carolina Rules of Civil Procedure for relief from default judgment or for vacatur of properly entered judgments and Appellants have not pointed to any evidence to the contrary.

Third, Appellants' reliance on the language in Subsection (B)(1)(e) is unavailing. As noted by Judge Simmons, the Administrative Order specifically provides that in "all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, ***or*** if an order of foreclosure has been entered, before any foreclosure sale," the Plaintiff shall serve a notice of right to foreclosure intervention. S.C. Admin. Order No. 2011-05-02-01, Sec. B(1) (emphasis added); *see also* 8/8/12 Order Granting Mot. at ¶ 16. Further, it provides that "[n]o foreclosure hearing ***or*** foreclosure sale may be held in the foreclosure action until the Mortgagee's attorney certifies" compliance with the Administrative Order. S.C. Admin. Order No. 2011-05-02-01, Sec. B(1) (emphasis added). Thus, the "or" indicates that there will be instances where only the foreclosure sale remains outstanding while the parties are engaged in foreclosure intervention. In that instance, the litigation may not proceed to sale until the Plaintiff's attorney certifies that

the foreclosure intervention process has been completed. Nowhere in that discussion does the Administrative Order vacate all prior judgments entered, even those by default.

In fact, for Appellants' position to be correct, the Administrative Order would have to explicitly state that all default judgments are set aside and vacated.[4] The Administrative Order does not make such a statement. Rather, Section B(1)(3), the subsection on which Appellant solely relies, states that when a loan modification or other means of loss mitigation are denied, the denial must be mailed to "all known addresses of the Mortgagor" and that it "shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint." *Id.* at B(1)(e). A fair reading of this subsection when read in context with all other sections of the Administrative Order is that if the action has already gone to judgment and only a sale is pending, the borrowers will not file an answer because the time period provided by the South Carolina Rules of Civil Procedure for filing and serving an answer has necessarily expired. As properly ruled by Judge Simmons, the "use of the word 'or' in subsection B(1) confirms that the Administrative Order did not vacate all prior foreclosure judgments that were issued before May 9, 2011." 8/8/12 Order Granting Mot. at ¶ 17. This is both a fair and proper reading of the Administrative Order.

Here, Appellants defaulted in the foreclosure action, a judgment was entered against them, and they were provided with an opportunity to participate in foreclosure intervention pursuant to the terms of the Administrative Order. *See id.* at ¶ 19

[4] Without question, the only means to vacate a judgment pursuant to the South Carolina Rules of Civil Procedure is with a motion filed with the court pursuant to Rules 55 and 60. *See* S.C. R. Civ. P. 60(b) (noting that "***on motion***" the court may relieve a party from a final judgment or order for five reasons (emphasis added)). Appellants have never filed such a motion.

(referencing the "exhaustive efforts" related to foreclosure intervention and the purpose and "intent" of the Administrative Order being fully complied with in this case). To now contend that their default is lifted, the judgment is vacated, and they can answer the Complaint without any repercussions is simply out of line with the terms and purpose of the Administrative Order and Judge Simmons properly ruled in CitiMortgage's favor on this issue.

For all of the foregoing reasons, the Administrative Order does not override Appellants' obligation to seek relief from the default judgment pursuant to the mechanisms outlined in the South Carolina Rules of Civil Procedure. CitiMortgage asks that this Court affirm Judge Simmons's ruling on that basis.

B. The Standard of Review Propounded by Appellants is Improper and, Even if Applied, it Results in a Ruling in Favor of CitiMortgage.

Appellants also spend considerable effort outlining the South Carolina Supreme Court's authority to issue Administrative Orders—an issue which CitiMortgage does not dispute and has never contested. *See* Apps. Initial Br. at pp.4–5, 7–9. Then, they claim that it "must [] be discerned what the intent of the Supreme Court's Administrative Order was in the matter at hand." *Id.* at p.5. As outlined above, that question is very easily answered by reference to the terms of the Administrative Order itself, *i.e.*, to create a uniform system for the handling of loss mitigation efforts following the filing of a foreclosure complaint. However, Appellants claim that interpretation of an Administrative Order, not any different than any other order issued by a court, is one of "first impression," requiring a strict standard of review. *See id.* at p.5.[5] This is patently incorrect.

[5] While initially claiming that the interpretation of an Administrative Order is a matter of "first

The Administrative Order is not a statute[6] nor is it a contract and, therefore, Appellants' reliance on the cases applying those rules of construction is misplaced. Instead, the Administrative Order is an order, ruling, or decision, just like any other form of case law that a party would rely on to support a position in litigation. Judge Simmons could review the terms of the Administrative Order, interpret the same, and apply them as he saw fit.[7] Following Appellants' dissertation on inapplicable rules of statutory construction and contract interpretation, Appellants then make the blanket, unsupported conclusion that the Administrative Order "should be honored on its face and ***strictly enforced***," as if it is a punitive measure. *See* Apps. Initial Br. at p.6 (emphasis added). Rather, the Administrative Order's sole purpose was to streamline loss mitigation efforts while the parties are in foreclosure, not punish the foreclosing entity. *See* S.C. Admin. Order No. 2011-05-02-01, Intro. The only "punitive" measure arises where ***either party*** fails to "act in good faith in complying with the terms of [the Administrative Order]." *Id.* at Sec. C ("In the event the Court determines that ***any party*** to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its

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impression," they later state that their purported standard of review is "established." Apps. Initial Br. at p.7. Appellants cannot assert these inconsistencies and then have it both ways.

[6] Even statutes "must receive a ***practical*** and ***reasonable*** interpretation consonant with the design of the legislature." *S.C. Dep't of Rev. v. Collins Entmt. Corp.*, 340 S.C. 77, 79, 530 S.E.2d 635, 636 (2000) (emphasis added) (cited *Busby v. Moore*, 330 S.C. 201, 498 S.E.2d 883 (1998)). Reading the Administrative Order to resuscitate the rights of a defaulting party without him/her having to follow the mechanisms provided in the South Carolina Rules of Civil Procedure, and where those mechanisms outlined are not specifically rejected in the Administrative Order itself, is neither practical nor reasonable.

[7] CitiMortgage notes that Appellants now contend that "the Master-in-Equity's judgment of default against the Appellants ***must be vacated*** and the Appellants must be given the right to answer or otherwise respond to Respondent's Complaint." Apps. Initial Br. at p.6 (emphasis added). The position that the judgment must be vacated is not supported by the plain language of the Administrative Order, as outlined herein, nor have Appellants ever filed a motion for relief from the default judgment. During the hearing Appellants' counsel admitted that the foreclosure judgment has never been vacated. *See* Hr'g Transcript 5:1–13. To take this position now is entirely disingenuous.

discretion, impose such sanctions as it determines to be reasonable and just under the circumstances.") (emphasis added). Therefore, to construe the Administrative Order as a punitive measure against only the foreclosing party is improper and outside of the clear dictates of the Order.

However, even reading the Administrative Order "strictly" as Appellants request, the Court should still affirm Judge Simmons's ruling in favor of CitiMortgage. In fact, a strict construction would merely allow a party to file an answer after the certification is filed, which if late, could be properly struck by the trial court upon motion by the opposing party, if there is already a default or judgment in the case—exactly what occurred in this instance.[8] Nowhere in the Administrative Order does it strip CitiMortgage's rights under the South Carolina Rules of Civil Procedure to file a Motion to Strike, Dismiss and for Judgment on the Pleadings pursuant to Rule 12(b), (c) and (f) in relation to Appellants' untimely Answer and Counterclaim. Therefore, Judge Simmons's ruling was proper, in line with the terms of the Administrative Order, and this Court should affirm his ruling.

C. Following Appellants' modification and construction reasoning to its logical conclusion results in a ruling in favor of CitiMortgage.

In several places, including in the midst of Appellants' discussion regarding relevance and precedential value of the letter from Court Administration, they discuss what the Chief Justice could have done in terms of the language and effect of the Administrative Order. Following this reasoning and discussion to its logical conclusion,

[8] If Appellants believed that an answer was proper, they should have filed the Rule 60(b) motion following the certification to attempt set aside the default judgment and then assert an answer. Appellants did not do so and, therefore, the default judgment remains valid and renders the answer untimely.

the only reasonable result is that Appellants' default was not vacated and the Judgment was not set aside, just as Judge Simmons ruled.

Specifically, in relation to rules of contract and statutory interpretation, which Appellants strongly support, South Carolina law provides that "[t]he statutory language must be construed in light of the intended purpose of the statute" and a "Court will not construe a statute in a way which leads to an absurd result or ***renders it meaningless***." *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (emphasis added). Moreover, "[c]ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Id.* (citing *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 463, 463 (1995)). Here, Appellants' interpretation of the Administrative Order would render meaningless the language in prior clauses regarding foreclosure sale ***or*** foreclosure hearing—the clauses relied upon by Judge Simmons.

The relevant clauses provide as follows:

> [B]efore any merits hearing in the case, ***or*** if an order of foreclosure has been entered, before any foreclosure sale, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention.
>
> . . .
>
> No foreclosure hearing ***or*** foreclosure sale may be held in the foreclosure action until the Mortgagee's attorney certifies [compliance with the Administrative Order].

S.C. Admin. Order No. 2011-05-02-01, Sec. B(1) (emphasis added). Appellants now argue that Subsection (B)(1)(e) automatically vacates their prior default and allows them to answer without repercussion and without having to follow the dictates of the South Carolina Rules of Civil Procedure. As argued during the hearing, Appellants state that the "or" language contemplates situations where a judgment is already entered, yet they should still be allowed to file a late answer. *See* Hr'g Transcript 7:17–9:13. Such an interpretation would render the "foreclosure hearing ***or*** foreclosure sale" clause ***meaningless***. Such an interpretation cannot stand and, therefore, the order striking Appellants' answer was proper.

Again, following Appellants' analysis to its logical conclusion, they claim that the answer should be timely and that Judge Simmons was required to vacate the default judgment. If that reasoning is accepted, compliance would have already been certified and a ***new hearing*** would have to be held to handle Appellants' affirmative defenses to foreclosure. Therefore, there would never be an instance where "or" foreclosure sale remains pending—a foreclosure hearing would ***always*** have to occur first. Under Appellants' reasoning, the relevant clauses would essentially be re-drafted[9] as follows:

> [B]efore any merits hearing in the case, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention.
> . . .
>
> No foreclosure hearing may be held in the foreclosure action until the Mortgagee's attorney certifies [compliance with the Administrative Order].

Because two entire clauses cannot be deleted or rendered meaningless, Judge Simmons's

[9] However, Appellants are adamant that only the Chief Justice could make this modification. *See* Apps. Initial Br. at p.9.

holding that the Administrative Order when read "in its entirety, evidences that it does not resurrect any procedural or substantive rights of the parties," is the correct one. 8/8/12 Order Granting Mot. at ¶ 17.

Then, in terms of the modification of administrative orders, Appellants state that "[h]ad the Supreme Court intended to modify the Administrative Order in question, it had a clear path to do so and that is by a subsequent administrative order not a letter from Court Administration." Apps. Initial Br. at p.9. Using this same reasoning and logic, had Chief Justice Toal intended to override the South Carolina Rules of Civil Procedure and vacate all foreclosure judgments, including those previously entered by default, she would have done so explicitly. In fact, the Administrative Order, if it intended such a result, would have to state that Rules 55 and 60 are lifted for all foreclosure actions in which a judgment is entered prior to the start of foreclosure intervention and all default judgments are set aside. The Administrative Order does not do that and, therefore, the plain language of the Administrative Order does not vacate the prior judgment or set aside Appellants' default, meaning Appellants' late-filed answer and counterclaim remains untimely. Judge Simmons's ruling should be affirmed on this basis.

D. The Letter from Court Administration is Entirely Relevant and Persuasive Secondary Authority, Not Hearsay.

Even assuming, *arguendo*, that the relevance and hearsay arguments related to Court Administration's letter were properly preserved, which CitiMortgage disputes, this Court should affirm on the merits. Not only was the review of Court Administration's letter supplemental to Judge Simmons's ruling, there is no question that it is both entirely relevant secondary authority and does not qualify as hearsay pursuant to the South Carolina Rules of Evidence. The letter was attached as Exhibit "A" to CitiMortgage's

Memorandum in Support of Motion to Strike, Dismiss and for Judgment on the Pleadings. It was provided as persuasive, secondary authority evidencing Court Administration's interpretation of the Administrative Order shortly after its issuance and at the request of the Chief Justice.

In the letter, Rosalyn Frierson notes that she was asked by the Chief Justice to respond to questions regarding the Administrative Order. *See* Ex. A, Mot. to Strike, Dismiss and for J. on the Pleadings. At that time, she noted that "the Chief Justice has considered the questions posed and has determined that there is no need to amend or modify the order."[10] *Id.* at p.1. She goes on to state as follows:

> In paragraph B(1)(e) [the provision on which Appellants rely] of the order, the tolling of the time to answer in the foreclosure action is to be just as in other cases where the time to answer is suspended, either by agreement, or rule. Regarding cases pending on May 9, 2011, where a Mortgagor was not in default when served with the notice of the right to foreclosure intervention, and elects to participate in foreclosure intervention, the Mortgagor will have 30 days from the date of mailing of the notice of denial of relief to respond to the complaint. ***If the Mortgagor is already in default, relief from default is by the usual Rule 55 and Rule 60 procedure.*** As to actions filed after May 9, where the Mortgagor elects to participate in foreclosure intervention, the time to answer is tolled, and the Mortgagor has 30 days from mailing of the notice of denial to answer the complaint.

Id. (emphasis added). As outlined below, while Appellants' objections and arguments are not preserved for appellate review, Judge Simmons properly considered this highly relevant and probative letter and reversal on this ground would be improper.

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[10] Even the Chief Justice deemed the Administrative Order clear on its face in that it does not override the default mechanisms provided by the South Carolina Rules of Civil Procedure. CitiMortgage notes that no amendment is needed as conceded by Appellants. *See* Apps. Initial Br. at pp.7–9 ("Had the Supreme Court intended to modify the Administrative Order in question, it had a clear path to do so and that is by a subsequent administrative order not a letter from Court Administration.").

i. The ruling in relation to the Court Administration letter is supplemental to the holding.

First, Judge Simmons's ruling as it relates to the letter was supplemental to the holding and did not serve as the basis for his holding that the Administrative Order alone does not contemplate vacatur of judgments or relief from default for mortgagors, such as Appellants. *See* 8/8/12 Order Granting Mot. at ¶ 18. In fact, Judge Simmons noted merely that his "holding is ***consistent with*** the letter from Court Administration dated June 7, 2011." *Id.* (emphasis added). In making this statement in the Order, it is clear that Judge Simmons interpreted the Administrative Order himself, came to the conclusion that it did not vacate Appellants' default or set aside the Judgment entered, and merely noted that his interpretation is consistent with that of Court Administration. In the Order, just prior to mentioning the letter, he properly concluded that the "Administrative Order does not contemplate vacatur of judgments or relief from default for mortgagors, nor does it override the mechanisms provided by the South Carolina Rules of Civil Procedure for relief from default or a judgment." *Id.* at ¶ 17. Appellants essentially concede this point by failing to identify any language in the Administrative Order providing that defaulting parties are entitled to have judgments entered against them set aside as a matter of course. If the Chief Justice intended to override the South Carolina Rules of Civil Procedure, the rules that all attorneys in this state are accustomed to abiding by in civil litigation, she would have done so explicitly. Therefore, this Court should affirm Judge Simmons's holding without even considering the Court Administration letter.

ii. The letter from Court Administration is relevant under the South Carolina Rules of Evidence.

Second, Appellants' contention that the "letter has no precedential value to the instant matter" appears to relate to their claim that it is irrelevant. Apps. Initial Br. at p. 7. Whether a case, letter, or other document has precedential value is unrelated to whether it is relevant to the litigation. A document, such as an appellate court opinion, may be both relevant and have precedential value. In other instances, a document may be relevant and not have any precedential value. *See, e.g., Penny Creek Assocs., LLC v. Fenwick Tarragon Apts., LLC*, 375 S.C. 267, 275, 651 S.E.2d 617, 621 (Ct. App. 2007) (noting that a "recitation of the facts of the case [in a reported opinion] has no precedential value"); *see also* S.C. App. Ct. R. 268(d)(2) (noting instances where cases have no precedential value). Here, while Appellants seem to argue that the letter from Court Administration lacks precedential value, an issue that is actually irrelevant, there cannot be any dispute that the letter is relevant to the issues involved in this litigation.

As part of this analysis, Appellants further argue that the letter is "addressed to attorneys that are not involved in this case and addresses fact-specific questions posed in a completely unrelated matter to the case at bar," thereby allegedly making the letter irrelevant. Apps. Initial Br. at p.7. This argument does not comport with the South Carolina Rules of Evidence. Rule 401 of the South Carolina Rules of Evidence provides that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probably than it would be without the evidence." Nowhere in this definition does it state that the evidence has to involve the same parties or the same attorneys. In fact, Court Administration's letter dated June 7, 2011 and written and signed by Rosalyn Frierson

directly addresses the answer provision on which Appellants rely, Section B(1)(e), and states that she has "been asked by the Chief Justice to respond." *See* Ex. A to Mem. in Support of Mot. to Strike, Dismiss and for J. on the Pleadings. Such a letter, interpreting the relevant provisions of the Administrative Order, is unquestionably relevant. This Court has found a letter related to a "collateral issue," *i.e.*, not the direct issue, which the letter addresses in this case, relevant. *See State v. Lawton*, 382 S.C. 122, 127, 675 S.E.2d 454, 457 (Ct. App. 2009). There, this Court noted the following in reaching its conclusion:

> According to Webster's Dictionary, the meaning of "relevant" is "having a significant and demonstrable bearing on the matter at hand." The circuit court utilized the following definition of relevance contained in Rule 401: "evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. ***Under either definition, we believe the letter in question was clearly relevant*** and should have been provided by the State in response to Lawton's Rule 5 request.

Id. (emphasis added). Both definitions apply here and, under either, the letter from Court Administration is relevant and, therefore, properly considered. Appellants contention appears to be that only another, revised Administrative Order would be relevant to the questions before the trial court. *See* Apps. Initial Br. at p. 7 (stating, even though it is not challenged, that the "Supreme Court is endowed with the sole and exclusive power and authority to 'make rules governing the administration of all the courts of the State'"). Such a position is unsupportable in light of the South Carolina Rules of Evidence.[11]

[11] CitiMortgage also notes that Appellants view the Administrative Order as a "clarification" of the 2009 HAMP Administrative Order No. 2009-05-22-01. Apps. Initial Br. at p.8. CitiMortgage disagrees and argues that based on the long block quote cited by Appellants, the Administrative Order is actually an expansion of the 2009 HAMP Administrative Order, and it does not attempt to "clarify" anything provided in the prior order. Thus, Appellants' conclusion that it is "undisputable, then, that the Supreme Court and,

iii. The letter from Court Administration is persuasive secondary authority and does not qualify as inadmissible hearsay under the South Carolina Rules of Evidence.

Again, Appellants did not obtain a ruling on their hearsay objection and, on that basis, it is not preserved for appellate review. Regardless, Appellants' hearsay argument is nothing more than a short recitation of the hearsay rules, none of which are applicable to the Court Administration letter. Rather, the Court Administration letter provides one interpretation of the Administration Order, thereby rendering it persuasive, secondary authority to which Judge Simmons could refer. As noted above, the letter itself was cited just as any secondary authority would be cited in a legal memorandum and was not presented as a witness statement. On that basis, Appellants' hearsay argument fails.

First, the Court Administration letter was not offered for the truth of the matter asserted, but rather to evidence the existence of one interpretation of the Administrative Order. *See* Mem. in Support of Mot. at p.20 ("[T]he Court should grant CitiMortgage's Motion because it is the only reasoning consistent with the plain language of the Administrative Order, the South Carolina Rules of Civil Procedure, and Court Administration's explanation of the Administrative Order."). Accordingly, it is anything but a "textbook" example of hearsay. Apps. Initial Br. at p.9 (stating that if it was intended as a means of clarifying the administrative order it "is a textbook example of the violation of the evidentiary rule against hearsay under Rule 801(c)"). Rule 801(c) of the South Carolina Rules of Evidence provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove

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more specifically, its honorable Chief Justice Toal issued the Administrative Order as a means to clarify and expand the scope of a previous administrative order that dealt with the very issue of foreclosure intervention" is erroneous to the extent it claims that there is any clarification and to the extent it claims that the 2009 HAMP Administrative Order addressed foreclosure intervention.

the truth of the matter asserted." In *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005), the South Carolina Supreme Court said: "Proof of a statement introduced to show a party heard and acted upon information is not objectionable hearsay." *Id.* at 31, 609 S.E.2d at 512 (citing *Webb v. Elrod*, 308 S.C. 445, 449, 418 S.E.2d 559, 562 (Ct.App.1992)). In this case, to the extent Appellants challenge the fact that Chief Justice instructed the Director of Court Administration in responding to the letter, the letter itself is not being used to show the truth of the Chief Justice's statements but rather simply that the Director of Court Administration heard and acted upon that information in drafting the letter. Accordingly, this is a textbook example of non-hearsay.

Similarly, to the extent Appellants are attacking the letter itself as hearsay, CitiMortgage again did not offer it to show that the statements were true, but merely that the information was provided for parties in other cases or judges to act upon in interpreting the Administrative Order. As in *Fields*, the letter was offered for the "fact that something was said." *Id.* (citing 31A C.J.S. *Evidence* § 259 (1996) ("Testimony is not hearsay where it relates to what the witness himself did in reliance on, or in response to, a statement, facts upon which action was taken, personal observations, explanation of conduct, the effect of the statements on the listener, the fact that something was said, or identifying what was said.")). More specifically, and by analogy, in *Fields*, a doctor testified as follows: "[T]he opinion of legal counsel was that there may be a conflict of interest if I will take the exam, which it was perceived that I knowed[sic] all the answers." *Id.* at 30, 609 S.E.2d at 511. The trial court excluded on the basis of that his representation of the legal advice he received was hearsay. The Court of Appeals

reversed and the South Carolina Supreme Court agreed with the Court of Appeals' reasoning:

> Podgorny's statement is a classic example of showing an action based upon information and is not offered for the truth of the matter asserted. The statement was not offered to prove that the counsel was correct in showing that there would be a conflict of interest if Podgorny took the test, but rather explained why Podgorny did not take the test[.]

Id. at 31, 609 S.E.2d at 511. Here, like the physician in *Fields*, the letter was offered not to show that the Chief Justice's advice to the Direct of Court Administration was correct, but to show why the letter was drafted. Ultimately, CitiMortgage and Judge Simmons agreed that the instruction was correct, but that alone does not render the letter inadmissible hearsay. Therefore, the letter is squarely non-hearsay under the South Carolina Rules of Evidence.

Second, and in line with the above, the Court Administration letter was not offered as a witness statement nor would it qualify as one in South Carolina as it relates to a legal question, not a factual issue. *See, e.g., Dawkins v. Field*, 354 S.C. 58, 580 S.E.2d 433 (2003). The letter itself is persuasive, secondary authority. It is well-established that when there is no South Carolina case law directly addressing an issue, a court may be "guided by decisions of other jurisdictions and the analysis of secondary authorities." *State v. Dudley*, 354 S.C. 514, 529, 581 S.E.2d 171, 179 (Ct. App. 2003). In fact, South Carolina courts routinely refer to secondary authorities in interpreting the law as it relates to the facts of any case. *See, e.g., State v. Dickey*, 394 S.C. 491, 508, 716 S.E.2d 97, 106 (2011) (citing ALR as "other secondary authority" supporting a position); *Pye v. Estate of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505, 511 (2006) (relying on South Carolina Civil Procedure and South Carolina Lawyer magazine); *Bostic v. American*

Home Mortgage Servicing, Inc., 375 S.C. 143, 150, 650 S.E.2d 479, 483 (Ct. App. 2007) (relying on secondary authority for general definition of a term in a statute); *Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 334, 628 S.E.2d 894, 898 (Ct. App. 2006) (referencing and relying upon Wright & Miller and Advisory Committee Notes to the rules as secondary authority); *Howard v. Nasser*, 364 S.C. 279, 288, 613 S.E.2d 64, 68 (Ct. App. 2005) (finding that "secondary authority supports" a certain presumption).

In this case, CitiMortgage offered the letter as a source interpreting the Administrative Order. At no point did CitiMortgage argue that it was binding on Judge Simmons. Instead, the letter was presented as secondary authority, similar to the sources listed in the citations above, for Judge Simmons to weigh and consider when coming to his conclusion on this topic. It served merely as a useful mechanism for Judge Simmons where there was no South Carolina case law on the issue presented. Therefore, the hearsay rules are inapplicable and Judge Simmons properly considered this authority to support his ruling.

IV. THE LETTER SENT BY FORECLOSURE COUNSEL TO APPELLANTS CANNOT BE USED AGAINST IT BY APPELLANTS PURSUANT TO THE TERMS OF THE ADMINISTRATIVE ORDER AND DOES NOT GIVE RISE TO A WAIVER.

Appellants' final argument is that a form letter sent to Appellants by foreclosure counsel amounts to a waiver of Appellants default and a waiver of the judgment entered against them. Apps. Initial Br. at pp.10–12. Judge Simmons reviewed the Notice of Denial sent by foreclosure counsel and determined that it did not amount to a waiver under South Carolina law, did not set aside Appellants' default and cannot unilaterally vacate the Judgment entered without court involvement. *See* 8/8/12 Order Granting Mot. at ¶ 21. Appellants have not pointed to any language evidencing a waiver or setting aside

of their default, nor have they identified any relevant case law or other support for a finding that CitiMortgage's foreclosure counsel could set aside a Judgment without court involvement. Therefore, this Court should affirm Judge Simmons's rulings on this issue.

A. The Language Relied Upon By Appellants Does Not Amount to a Waiver Pursuant to South Carolina Law.

Appellants claim that the language in the Notice of Denial providing that they have 30 days to serve an answer results in a waiver. Because the Notice of Denial is a form response that mirrors the Administrative Order, it serves only to reiterate the language of the Administrative Order which, as noted above, does not contemplate an Answer in this default situation. Additionally, the language referenced does not amount to a waiver under South Carolina law.

As noted in CitiMortgage's supporting memorandum, waiver is "protective only" and may only be "invoked as shields, and not as [an] offensive weapon[]." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 387 (1992). As defined by South Carolina law, waiver is "a voluntary and intentional abandonment or relinquishment of a known right." *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (1994) (citing *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). "[I]n order to constitute a waiver the person against whom the waiver is claimed must have full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such right." *Sims v. Ham*, 275 S.C. 369, 372, 271 S.E.2d 316, 318 (1980) (internal citation omitted). Moreover, a waiver may be "express or implied." *Zeller v. Cumberland Truck Sales*, 272 S.C. 558, 562, 253 S.E.2d 111, 112 (1979). "[W]here an implied waiver is claimed, caution must be exercised, for waiver

will ***not be implied from doubtful acts***." *Id.* (citing 28 Am. Jur. 2d, *Estoppel and Waiver*, § 160 (emphasis added).)

In this case, Judge Simmons properly ruled that this language does not amount to a waiver. *See* 8/8/12 Order Granting Mot. at ¶ 21. Because the Administrative Order does not contemplate vacating judgments or setting aside defaults, the referenced language simply cannot waive the default and judgment previously entered. *See* Hr'g Transcript 11:21–12:10; 13:14–20. The Judgment was already entered and it is CitiMortgage's position that the Administrative Order does not vacate judgments or set aside defaults. Therefore, when the form language was cited, there was nothing to waive. If Appellants believed that an answer was appropriate, they should have sought to set aside the Judgment pursuant to Rule 60(b).

B. Appellants Fail to Identify Any Support for their Argument that Foreclosure Counsel Could Set Aside the Default and Vacate the Judgment Without Court Action.

Moreover, during the hearing on July 12, 2012, when asked by Judge Simmons if there can be a waiver following entry of a judgment, without a Rule 60 motion, Appellants' position was that the Administrative Order allows such action.

> By the Court: All right, Ms. Swing, legally, can you have a waiver after a judgment is entered? Once the judgment is entered, doesn't that kind of -- it becomes the Order unless there's a Rule 59 or a Rule 60 Motion.
>
> Ms. Swing: Well, not according to the Administrative Order and what the Administrative Order and what the Administrative Order provides these mortgagors the right to do and not according to CitiMortgage's own counsel, Rogers Townsend.

Hr'g Transcript 12:11–13:18. Judge Simmons ruled that the Administrative Order does not "unilaterally vacate the previously entered Judgment without Court involvement."

8/8/12 Order Granting Mot. at ¶ 21. Now, on appeal, Appellants concede that they "agree[] with the Court's holding that the previously entered default judgment ***may not be vacated without court involvement.***" Apps. Initial Br. at p.11 (emphasis added). They further claim that the language of the Notice of Denial instead resulted in a "waiv[er] [of] ***any objection*** by the Respondent to the lower court vacating the default judgment and allowing Appellant to file an answer within 30 days." *Id.* (emphasis added). This new argument related to the waiver of an objection is not preserved for appellate review because it was not raised in Appellant's Memorandum in Opposition or during the hearing and, therefore, was not properly presented to the trial court for a ruling. *See Wilder*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *see also* Hr'g Transcript 5:10–13 (conceding that the default judgment was never vacated, voided, or set aside). Appellants argued only that CitiMortgage waived the default judgment itself—a claim that Appellants now concede CitiMortgage cannot do unilaterally. *See* Mem. in Opposition at p.4 ("Plaintiff's[sic] waived the default when it served the notice of denial of foreclosure intervention."); Hr'g Transcript 12:15–13:12. Therefore, Appellants' new argument on appeal is improper.

Moreover, even considering Appellants new argument that CitiMortgage "impliedly waived any objection . . . to the lower court vacating the default judgment and allowing Appellant to answer," it still fails under the facts and procedural history of this case. Apps. Initial Br. at p.11. Even assuming without admitting that an objection to Appellants' default was waived, Appellant would still have to file a motion pursuant to

Rule 60(b), outlining the appropriate basis for setting aside the judgment. Appellants do not contend that CitiMortgage consented to setting aside the Judgment and, there is no question that a Rule 60(b) motion was never filed. *See* S.C. R. Civ. P. 60(b) (noting that "[o]n motion," the "***court may*** relieve a party . . . from a final judgment") (emphasis added).

In addition to Appellants never filing the appropriate motion, the first three grounds provided in Rule 60(b) for relief, *i.e.*, mistake, inadvertence, surprise or excusable neglect (60(b)(1)), newly discovered evidence (60(b)(2)), and fraud, misrepresentation, or other misconduct of an adverse party (60(b)(3)), all require that the motion be made "within a reasonable time . . . ***not more than one year after the judgment***." S.C. R. Civ. P. 60(b) (emphasis added). Here, the Judgment was entered in 2010, which is two years before Appellants filed their answer. Therefore, Appellants simply could not rely on 60(b)(1)–(3) to set aside the default judgment. Moreover, the remaining two grounds to set aside the Judgment of Foreclosure and Sale, Rule 60(b)(4) and (5) , are inapplicable here.

Rule 60(b)(4) provides that a judgment may be set aside if it is void. "The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 552, 703 S.E.2d 499, 503 (2010) (citing *McDaniel v. U.S. Fid. & Guar. Co.,* 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) (citations omitted)). Here, there is no question that Judge Simmons had jurisdiction over the action, which revolved around property located in Greenville County, and that Appellants were properly served with the Summons and

Complaint on December 30, 2009. *See BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (noting that a "judgment is void if a court acts without personal jurisdiction" and that a "court generally obtains personal jurisdiction by the service of a summons"); *see also Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) (noting that a "judgment of a court without subject matter jurisdiction is void" and that subject matter jurisdiction is the "power to hear and determine cases of a general class").

Similarly, Appellants cannot establish Rule 60(b)(5), SCRCP, where a judgment is satisfied, released or discharged. It is stated that "a judgment of damages for past wrongs is not such a judgment as is covered or contemplated in this section." *Saro Invs. v. Ocean Holiday P'ship*, 314 S.C. 116, 120 n.3, 441 S.E.2d 835, 838 n.3 (Ct. App. 1994). "The rule is generally applicable when there has been a decree for injunctive relief." *Id.* "Generally, the standard to be applied in determining whether an order or judgment has prospective application within the meaning of Rule 60(b)(5) is whether it is executory or involves the supervision of changing conduct or conditions by the court." *Id.* The Judgment of Foreclosure and Sale mandates a one-time change in ownership—the foreclosure sale—and, just like with partition orders, falls outside of Rule 60(b)(5). *See, e.g., Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 49, 590 S.E.2d 502, 505–506 (Ct. App. 2003) (noting that "[p]artition orders . . . are executed orders because they mandate a one-time change in the ownership of property" and fall outside the scope of Rule 60(b)(5)).

Based on the foregoing, CitiMortgage did not waive Appellants default, could not waive the judgment, and the trial court's ruling should be affirmed.

C. As an Additional Sustaining Ground, the Plain language of the Administrative Order Provides that Documents Such as the Notice of Denial May Not Be Used Against a Party.

This Court may affirm Judge Simmons's ruling without reference to the Notice of Denial letter sent by foreclosure counsel. During the hearing, CitiMortgage argued that the letter was not admissible against it for purposes of obtaining an advantage in the litigation. *See* Hr'g Transcript 10:8–17. While not a basis for Judge Simmons's ruling, this argument serves as an additional sustaining ground for the ruling on the waiver issue.

Rule 220(c), SCACR provides the court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Accordingly, a "respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Here, CitiMortgage noted that Section C of the Administrative Order specifically notes that "[n]o document, statement or evidence of any kind shared, released or exchanged exclusively for purposes of foreclosure intervention pursuant to this order shall be admissible in any subsequent proceeding." S.C. Admin. Order No. 2011-05-02-01, Sec. C. There is no question that the Notice of Denial is a statement released exclusively due to foreclosure intervention. Similarly, there is no question that Appellants are attempting to use this statement to evidence an alleged "waiver" of rights by CitiMortgage. Therefore, pursuant to the terms of the Administrative Order, it is inadmissible for that purpose. CitiMortgage states that such improper use of a statement made for purposes of foreclosure intervention is improper and, on that basis, should not be considered.

Based on the foregoing reasons, CitiMortgage did not waive Appellants' default, could not unilaterally vacate the Judgment and, therefore, Judge Simmons properly ruled that the answer was untimely. This Court should affirm those rulings in their entirety.

CONCLUSION

For all of the foregoing reasons, Judge Simmons's ruling was proper and CitiMortgage respectfully requests that this Court affirm his ruling in its entirety. Reversal is not warranted.

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