THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Doyet A. Early III, Circuit Judge

Appellate Case No. 2018-002068

Wells Fargo Bank, N.A.,..Respondent,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department of Revenue; Linda Lawrence Bowen; Defendants,

Of whom Michael G. Morgan is the..Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. **Where the case had been referred to the master-in-equity and there were no matters pending before a circuit judge, is that circuit judge's order purporting to rule on an already adjudicated motion void?**

II. **Did the circuit court commit reversible error in dismissing Appellant's counterclaim for violation of S.C. Code Ann. § 37-10-102 coupled with unconscionability?**

III. **Did the circuit court commit reversible error in determining the statute of limitations in S.C. Code Ann. § 37-10-105(A) barred Appellant's counterclaim?**

IV. **Did the circuit judge commit reversible error in basing his decision to grant Respondent's motion to dismiss on unpublished opinions?**

V. **Did the circuit judge commit reversible error in applying the heightened pleading standard for fraud where Appellant did not, and was not attempting to, plead a fraud claim?**

VI. **Did the circuit court err in dismissing Appellant's counterclaim with prejudice and not allowing him an opportunity to amend?**

STATEMENT OF THE CASE

Respondent, Wells Fargo Bank, N.A. (hereinafter "Wells Fargo") brought this mortgage foreclosure action seeking to collect on a mortgage loan that Wells Fargo (through a predecessor by merger) made to Appellant, Michael G. Morgan (hereinafter "Morgan"), with an additional cause of action seeking the equitable remedy of reformation of that mortgage. (R. pp. 25-30.) In his amended answer and counterclaim, Morgan asserted a counterclaim for violation of S.C. Code Ann. § 37-10-102, commonly known as the attorney preference statute, coupled with unconscionability, alleging that the loan subject of the mortgage was induced by unconscionable conduct. (R. pp. 67-69.) Morgan's amended answer and counterclaim states the following:

> With respect to the closing of the mortgage loan subject of this case, the original creditor did not comply with the attorney preference or insurance preference provisions of S.C. Code Ann. § 37-10-102.
>
> Agents of the original creditor (Wells Fargo or its predecessor in interest), without the knowledge or permission of Morgan, falsified and forged Morgan's signature on documents relating to the application for and origination of the subject mortgage loan.
>
> Agents of the original creditor (Wells Fargo or its predecessor in interest) knew that others, without the knowledge or permission of Morgan, falsified and forged Morgan's signature on documents relating to the application for and origination of the subject mortgage loan, yet they permitted this and went through with making the loan anyway.
>
> All of this occurred without Morgan's knowledge.
>
> No attorney licensed to practice law in South Carolina supervised the closing of the mortgage loan.
>
> Instead, the original creditor (Wells Fargo or its predecessor in interest) had one person sent to Morgan's

> house with the closing documents, and only this person was present with Morgan at Morgan's signing of closing documents for this loan.
>
> The loan subject of the mortgage was induced by unconscionable conduct, such conduct including, but not limited to, the following:
>
> a. The unauthorized practice of law;
>
> b. The deprivation of Morgan's right to choose his own, unconflicted counsel to represent him in the closing of the mortgage loan at issue;
>
> c. Forgery and falsification of documents; and
>
> d. Concealment of that forgery and falsification from Morgan.
>
> For each violation of S.C. Code Ann. § 37-10-102, Morgan is entitled to recover all relief available under S.C. Code Ann. § 37-10-105, including the provided under S.C. Code Ann. § 37-10-105(C), damages, attorney's fees, and penalties as provided in the South Carolina Consumer Protection Code.

(R. p. 68.)

Wells Fargo moved to dismiss the counterclaim, stating that the claim was barred by the statute of limitations and citing three unpublished opinions for the proposition that Morgan's "allegations are insufficient under South Carolina law." (R. pp. 79-81.)

Both parties submitted memoranda concerning the motion. (R. pp. 121-32.) Wells Fargo continued to cite unpublished opinions throughout its memorandum. (R. pp. 123-26.)

The circuit court heard argument on the motion. (R. pp. 89-102.) The court issued an order granting Wells Fargo's motion. (R. pp. 1-10.) Citing unpublished

opinions throughout, the circuit court's order ruled that Morgan's counterclaim was barred by the three-year statute of limitations set forth in S.C. Code Ann. § 37-10-105(A) and that the longer statute of limitations under S.C. Code Ann. § 37-10-105(C) was inapplicable because Morgan failed to allege facts that would constitute unconscionability. (R. pp. 3-9.) The circuit court based its ruling on Morgan not having alleged the elements of fraud in his counterclaim, concluding that this meant that Morgan failed to allege inducement. (R. pp. 5, 8.) The circuit court dismissed Morgan's counterclaim with prejudice. (R. p. 9.)

Morgan timely moved for the circuit court to reconsider this ruling or at least clarify it. (R. pp. 82-88.) Morgan pointed out that the three-year statute of limitations in S.C. Code Ann. § 37-10-105(A) does not bar the assertion of a violation of the attorney preference statute in an action brought to collect the subject loan debt. (R. pp. 83-84.) Morgan also argued that his "counterclaim does allege sufficient facts that, when taken as true and with all reasonable inferences therefrom drawn in his favor, allege unconscionability or inducement by unconscionable conduct" and it was error for the circuit court to rely on the standard for pleading a fraud claim in reaching its decision, since Morgan did not plead a fraud claim and "*[i]nducement* and *fraud* are not the same things." (R. pp. 84-86.) Morgan further argued that the circuit judge erred in dismissing his claim with prejudice and in not providing him an opportunity to amend if the judge believed his pleading was deficient. (R. p. 87.)

Wells Fargo submitted a memorandum in opposition to the motion to reconsider. (R. pp. 133-40.) The circuit court heard argument on the motion to reconsider. (R. pp. 104-19.)

Following that hearing, the circuit judge who had dismissed the counterclaim filed an order on October 29, 2018, that granted the motion to reconsider, reversed the decision to dismiss the counterclaim, and referred this action to the master-in-equity. (R. pp. 11-16.)

On November 2, 2018, the judge who had already granted the motion to reconsider and referred the case filed an order that stated that Morgan's motion to reconsider was denied. (R. p. 17.) That order did not purport to undo and did not mention the order granting the motion to reconsider and referring the case that had already been filed. (R. p. 17.) Out of an abundance of caution, Morgan brought this appeal.

STATEMENT OF FACTS

Morgan's loan closing was replete with forged documents, none of which he knew about. The people involved in making the mortgage loan in this case to Morgan must have wanted to make sure that he had very little chance to know what they were doing, since they worked hard to keep him from being represented by counsel in his closing. They slipped an attorney preference form in the stack of documents, to paper their file, but it was signed at the closing, which is the date it was dated – plainly a violation of the attorney preference statute. King v. Am. Gen. Finance, Inc., 386 S.C. 82, 91, 687 S.E.2d 321, 326 (2009) ("the suggestion that the attorney preference statute disclosure may be made at closing borders on frivolity"). Moreover, the lawyer named on the untimely form did not actually supervise the closing. The attorney preference form and closing documents were signed at Morgan's house, and no one was there

except him and a non-lawyer individual sent out to have him sign the documents. The subject loan is a Pick-a-Payment loan, known for its deceptive terms.

People worked hard to make sure Morgan never had any meaningful choice about whether to enter into this mortgage loan.

STANDARD OF REVIEW

Whether an order is void. Whether an order is void is a question of law. See Chew v. Newsom Chevrolet Inc., 315 S.C. 102, 103, 431 S.E.2d 631 (Ct. App. 1993) ("question of subject matter jurisdiction is a question of law for the court"). The appellate court reviews all questions of law *de novo*. Transportation Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010); Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010).

Motion to dismiss. "In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citation omitted). The ruling on a motion to dismiss for failure to state facts sufficient to constitute a cause of action must be based solely upon the allegations set forth in the pleading. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). "The motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. The question is whether in the light most favorable to plaintiff, and with every doubt resolved in her behalf, the complaint states any valid claim for relief." Dye v. Gainey, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). Counterclaims are treated no differently from complaints in this regard. Charleston County School Dist. v. Laidlaw Transit Inc., 348

S.C. 420, 424, 559 S.E.2d 362 (Ct. App. 2001). The claim should not be dismissed even if the court doubts the claimant will prevail in the action. Dye, 320 S.C. at 67-68. The question is whether, in the light most favorable to the party asserting the counterclaim, and with every doubt resolved in his favor, the counterclaim states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

ARGUMENT

I. The order purporting to deny the motion to reconsider is void.

By the time the circuit judge filed a purported order denying the motion to reconsider, he had already filed an order that granted the motion to reconsider. (R. pp. 11-17.) Importantly, the order that granted the motion to reconsider also referred this case, without any limitation on the reference, to the master-in-equity. (R. p. 15.) Accordingly, since the circuit judge had already ruled on the motion to reconsider (granting it) and referred the case to the master-in-equity on October 29, the circuit judge did not have jurisdiction to issue an order purporting to deny the motion to reconsider on November 2. (R. pp. 11-17.)

"A master's authority to determine issues referred to him by the circuit court is a question of subject matter jurisdiction[.]" Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 74-75, 773 S.E.2d 607, 616 (Ct. App. 2015); accord Bunkum v. Manor Properties, 321 S.C. 95, 99, 467 S.E.2d 758, 761 (Ct. App. 1995) (question concerning scope of master's authority under order of reference was "issue[] relating to subject matter jurisdiction"); Bonney v. Granger, 292 S.C. 308, 322, 356 S.E.2d 138, 147 (Ct. App. 1987) ("[b]y consenting to an order of reference without limitation, [the appellant] submitted to the master's subject matter jurisdiction to the same extent as if

the matter were before the circuit court"). By statute, "[w]hen some or all of the causes of action in a case are referred to a master-in-equity or special referee, the master or referee" – not a circuit judge – "shall enter final judgment as to those causes of action[.]" S.C. Code Ann. § 14-11-85. Consistently with this statute, Rule 53(c), SCRCP, provides that, once a case has been referred, "the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter."

"When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner as the circuit court, unless the order of reference specifies or limits his powers." Deep Keel, 413 S.C. at 75 (quoting Smith Cos. of Greenville, Inc. v. Hayes, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993)). "Once an action is referred, the master possesses all power and authority that a circuit judge sitting without a jury would have in a similar matter." Normandy Corp. v. S.C. Dept. of Transp., 386 S.C. 393, 688 S.E.2d 136, 142 (Ct. App. 2009). Accordingly, when a case is referred to a master-in-equity without any limitations on the scope of the master's power, i.e., the entire case is referred, subject matter jurisdiction over the whole case is moved from the circuit court and is vested in the equity court of the master. Normandy Corp., 688 S.E.2d at 142; Bonney, 292 S.C. at 322; see Deep Keel, 413 S.C. at 75; Smith Cos., 311 S.C. at 360.

That is what happened here. The October 29 order vested subject matter jurisdiction of the entire case in the master-in-equity. (R. p. 15.) It is not as though the circuit judge retained jurisdiction to rule on the motion to reconsider – he had already ruled on it by the time he filed his purported order denying it on November 2. (R. pp.

11-17.) Wells Fargo made no motion under Rule 59 directed at any aspect of the October 29 order, including the reference to the master-in-equity. The circuit judge had fully concluded the proceedings before him related to Wells Fargo's motion to dismiss and Morgan's motion to reconsider the granting of that motion to dismiss and had vested the master-in-equity with full subject matter jurisdiction to make any further rulings in the case, yet the circuit judge purported to exercise that jurisdiction anyway. S.C. Code Ann. § 14-11-85; Rule 53(c), SCRCP; Normandy Corp., 688 S.E.2d at 142; Bonney, 292 S.C. at 322; see Deep Keel, 413 S.C. at 75; Smith Cos., 311 S.C. at 360; (R. pp. 15, 17). Just as the Supreme Court recently observed when a circuit judge had purported to make a ruling in a case after sending the case to arbitration, the circuit judge here simply lacked jurisdiction to issue the November 2 order. See Ex parte Cone v. Hood, 425 S.C. 349, 350, 822 S.E.2d 599 (2018).

When an order is rendered in the absence of subject matter jurisdiction, that order is void. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002); Bunkum, 321 S.C. at 95. Here, the November 2 order is void. The circuit judge had already ruled on the motion to reconsider on October 29, concluding the proceedings related to that motion, and referred the entire case, without limitation, to the master-in-equity. At the time that the circuit judge filed the order purporting to deny the motion to reconsider, subject matter jurisdiction of this case had vested in the master-in-equity. Normandy Corp., 688 S.E.2d at 142; Bonney, 292 S.C. at 322; see Deep Keel, 413 S.C. at 75; Smith Cos., 311 S.C. at 360. The circuit court lacked jurisdiction to enter the November 2 order, which is, accordingly, void. Deep

Keel, 413 S.C. at 75; Normandy Corp., 688 S.E.2d at 142; Universal Benefits, 349 S.C. at 183; Bunkum, 321 S.C. at 95; Smith Cos., 311 S.C. at 360; Bonney, 292 S.C. at 322.

A void order "is, in legal effect, nothing." Innovative Waste Mgmt. Inc. v. Crest Energy Partners GP, LLC, 423 S.C. 611, 815 S.E.2d 780, 782 (Ct. App. 2018) (quoting Turner v. Malone, 24 S.C. 398, 401 (1886)), *aff'd as modified*, 425 S.C. 568, 824 S.E.2d 214 (2019). The void nature of the November 2 order means that there is nothing for Morgan to appeal. Rule 201, SCACR. The dismissal of his counterclaim having been undone by the October 29 order that granted his motion to reconsider, Morgan is not an aggrieved party. Rule 201(b), SCACR. The November 2 order, being void, is a nullity, not a "final judgment, appealable order or decision." Rule 201(a), SCACR; accord Universal Benefits, 349 S.C. at 183; Smith v. Ocean Lakes Family Campground, 315 S.C. 379, 380, 381, 433 S.E.2d 909, 910 (Ct. App. 1995).

There does not appear to be a large body of case law concerning how our state's appellate courts are to treat an appeal of an order that the appellate court determines is void. In Bradley v. Hullander, decided before the adoption of the South Carolina Appellate Court Rules, our Supreme Court dealt with the order on the merits of the appeal and ruled for the appellant as to that order, issuing an opinion that determined the order was invalid. 266 S.C. 188, 195, 22 S.E.2d 283, 287 (1976). Of note, though, is that Bradley also involved the appeal of another order, which was not void. Id. at 191-93, 195.

In Smith v. Ocean Lakes Family Campground, this court dismissed an appeal, apparently after briefing, issuing an opinion that determined that "there has been no valid order entered in this case, and the appealed order is a nullity entered without

power or authority." 315 S.C. at 380-82 & n. 1. From the opinion, it appears that the order determined to be void was the only order subject of the appeal. Id. at 380-82.

The Supreme Court, in Hudson v. S.C. Dept. of Transp., issued an opinion that vacated an appealed order upon determining it to be void. 324 S.C. 245, 478 S.E.2d 839, 840 (1996). The opinion does not discuss whether there was any briefing in the appeal, and it appears to have been an appeal of only the order the Court determined was void. Id.

The situation was somewhat different in the Deep Keel case, in which this court determined that a finding by the master-in-equity had exceeded the scope of his limited jurisdiction under the limits given in the order of reference. 413 S.C. at 74-75. Because that particular finding exceeded the scope of the order of reference, this court vacated that finding. Id. at 75, 76.

The purported order filed November 2 is void. This court should so rule, vacate that order, and dismiss this appeal for lack of Morgan being aggrieved by a "final judgment, appealable order or decision." Rule 201(a)&(b), SCACR.

II. Morgan's amended answer and counterclaim stated a cause of action for violation of S.C. Code Ann. § 37-10-102, including under S.C. Code Ann. § 37-10-105(C).

The lower court was substantively correct to grant the motion to reconsider the dismissal of Morgan's counterclaim. Accordingly, even if this court does not determine that the November 2 order is void, this court should reverse it and the order that granted Wells Fargo's motion to dismiss.

The circuit court ruled that the statute of limitations barred Morgan's counterclaim for violation of S.C. Code Ann. § 37-10-102. (R. pp. 3-9.) In pertinent

part, S.C. Code Ann. § 37-10-102, typically called the attorney preference statute, provides:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -
>
> (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.
>
> The creditor may comply with this section by:
>
> (1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or
>
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

A statute in the same chapter, S.C. Code Ann. § 37-10-105, provides the remedies for a violation of § 37-10-102, stating:

> A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a

violation of this chapter more than three years after the violation occurred, ***except as set forth in subsection (C)***. The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. ***This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.***

(B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(C) ***If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct***, the court may, in an action other than a class action:

(1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;

(2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

(3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or

(4) award:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

> (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
>
> (c) attorney's fees and costs.
>
> ***An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.***
>
> (D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

S.C. Code Ann. § 37-10-105 (emphasis added.)

Wells Fargo did not contend that Morgan's counterclaim was brought after the scheduled maturity date of Morgan's loan. As discussed below, the counterclaim sets out a claim for violation of the attorney preference statute coupled with inducement of the mortgage loan by unconscionable conduct – certainly so when viewed in the light most favorable to Morgan, as it must be. The statute of limitations for actions purely seeking relief under S.C. Code Ann. § 37-10-105(A) is no bar to Morgan's claim. S.C. Code Ann. § 37-10-105(A)&(C).

Wells Fargo owns the note and mortgage subject of the loan involved and is, through a series of mergers, the original creditor who made that loan. (R. pp. 25, 28.) Wells Fargo, as the original creditor, did not comply with the attorney preference or insurance preference provisions of S.C. Code Ann. § 37-10-102 in connection with making the subject mortgage loan. (R. p. 68.)

The General Assembly has provided that the Consumer Protection Code "shall be liberally construed and applied to promote its underlying purposes and policies."

S.C. Code Ann. § 37-1-102(1). The overarching purpose of §§ 37-10-102 and -105, as well as the purpose of the Consumer Protection Code in general, is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King, 386 S.C. at 89, 90; Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). Among the specifically enumerated purposes of the Consumer Protection Code are "to further consumer understanding of the terms of credit transactions" and "to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors." S.C. Code Ann. § 37-1-102(2)(c)&(d).

The court must, accordingly, interpret S.C. Code Ann. § 37-10-105, including the statute's use of the word "unconscionable," consistently with the purposes of the Consumer Protection Code, i.e., liberally in favor of the furtherance of consumer understanding of the terms of credit transactions and the protection of consumers against unfair practices by suppliers of consumer credit. S.C. Code Ann. § 37-1-102(1)&(2)(c)&(d).

At issue in this case is a South Carolina mortgage loan. (R. pp. 25-28.) Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. Id.

In Wachovia Bank, N.A. v. Coffey, this court observed that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]" 389 S.C. 68, 698 S.E.2d 244, 248 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013). This court noted that the purpose served by our Supreme Court requiring lawyers to supervise mortgage loan closings is "the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." Id. (quoting Buyers Service, 292 S.C. at 431). The Supreme Court favorably cited Coffey's "inherently prejudicial" description in Matrix Financial Services Corp. v. Frazer, which reaffirmed that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." 394 S.C. 134, 714 S.E.2d 532, 534 (2011). That prejudice inheres in the unauthorized practice of law is an accurate statement of the law of this state.

Among the chief reasons our Supreme Court requires an attorney licensed to practice law in this state to supervise a mortgage loan closing is so that the mortgage loan customer is in a position to receive accurate information from the lawyer, who represents the customer, about the terms of credit transactions, and so that the lawyer may protect the customer from unfair practices by suppliers of mortgage credit. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The closing lawyer represents the mortgage loan customer[1], Doe, 355 S.C. at 315, and must supervise the closing because, among other things, "attorneys . . . have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of" the Supreme Court. Buyers

[1] Under certain circumstances, the closing attorney may also represent the lender. Doe, 355 S.C. at 315.

Service, 292 S.C. at 434. Per our Supreme Court, underpinning the attorney supervision requirement is the principle that "protection of the public is of paramount concern." Id. Protection of the public from what? Chiefly, from the consequences of people entering into mortgage loan transactions without the opportunity to make a meaningful, informed choice about whether to sign on to the terms of that transaction. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The closing attorney is there to ensure the choice to enter into the mortgage loan is meaningful and the bargaining process is fundamentally fair. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). This is no less so in the context of an out-of-court transaction like a mortgage loan closing. See Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The right of a mortgage loan customer to be represented in a mortgage loan closing by a loyal, unconflicted attorney of his own choice, there to ensure the customer has a meaningful choice about whether to enter into the transaction and that the process is fair, is indeed substantial. Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

Unconscionability simply means "[e]xtreme unfairness." Black's Law Dictionary 1663 (9th ed. 2009). In discussing unconscionability, our Supreme Court has said that "[a]bsence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007). Unconscionability is not and should not be a one-size-fits-all inquiry; rather, "unconscionability claims are context-specific[.]" McFarland v. Wells Fargo Bank,

N.A., 810 F.3d 273, 283 (4th Cir. 2016) (analyzing West Virginia unconscionability law).

"A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." In re: Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). "Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute." Protection & Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 274, 789 S.E.2d 756, 760 (Ct. App. 2016). Just as the Fourth Circuit concluded that the West Virginia legislature had done with similar statutory language, the South Carolina General Assembly's language providing that S.C. Code Ann. § 37-10-105(C) applies where the court finds that an "agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct" (emphasis added) was intended to and did "diverg[e] from [the] traditional understanding [of substantive unconscionability] and authoriz[ed] a claim for unconscionable inducement that does not require a showing of substantive unconscionability." McFarland, 810 F.3d at 284. Inducement by unconscionable conduct under S.C. Code Ann. § 37-10-105(C), rather, focuses on process rather than substantive transaction terms. Cf. McFarland, 810 F.3d at 284. In a situation of inducement by unconscionable conduct, the underlying loan terms do not have to be unconscionable; rather, the court looks to the surrounding conduct and assesses that conduct for extreme unfairness. See id.; S.C. Code Ann. § 37-10-105(C).

Our General Assembly has provided that analysis of unconscionability or inducement by unconscionable conduct under the Consumer Protection Code is not

limited to a pre-written checklist of elements or even factors. S.C. Code Ann. § 37-5-108(4)(a) ("consideration must be given to applicable factors," listing some factors but noting that list is "without limitation"). An absence of meaningful choice and a lack of fundamental fairness, though, are among the hallmarks of unconscionability. See Simpson, 644 S.E.2d at 669. The order granting the motion to dismiss in this case took a very narrow view, almost a straitjacketed view, of what constitutes unconscionability. (R. pp. 4-8.) That was error. Were this court to uphold that interpretation, that might have grave and far-reaching consequences for the law of this state. That interpretation is inconsistent with the legislative mandate concerning interpretation of the Consumer Protection Code. S.C. Code Ann. § 37-1-102(1)&(2)(c)&(d). The essence of unconscionability is fundamental unfairness, and there are as many forms in which that may manifest itself as there are opportunities for it to do so. See McFarland, 810 F.3d at 283; S.C. Code Ann. § 37-5-108(4)(a); Black's Law Dictionary at 1663.

If the lending institution making the mortgage loan deprives the customer of the opportunity to have an attorney represent him in the closing, it has deprived him of a substantial right that exists to make sure he has a meaningful choice and that the process is a fair one. See Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. That is extremely unfair. The closing of a South Carolina mortgage loan without its supervision by a licensed South Carolina attorney, particularly where the customer is not given any opportunity to select an attorney to represent him, *is* inducement of the loan by unconscionable conduct. The unauthorized practice of law is unconscionable conduct, and closing a mortgage loan without the required attorney supervision, a requirement that exists to ensure fundamental fairness and borrower

understanding of the terms of the transaction, is inducement of the loan by unconscionable conduct. That is the only reading of Simpson, Hagood, Coffey, Matrix, Doe, Buyers Service, §§ 37-1-102, 37-10-102, and 37-10-105 that is logically consistent and is in accord with the public policy of this state. Given what these cases hold and the interpretive mandate of S.C. Code Ann. § 37-1-102(2)(c) and (d), what other conclusion could be reached? Indeed, "the fact that the seller, lessor, or lender knowingly has taken advantage of the inability of the consumer or debtor reasonably to protect his interests" is specifically listed by our legislature as a factor to be used in analyzing whether a transaction was induced by unconscionable conduct. S.C. Code Ann. § 37-5-108(4)(a)(iv).

Especially in light of these principles, Morgan's amended answer and counterclaim alleges unconscionability or inducement by unconscionable conduct. The counterclaim alleges that Wells Fargo did not ascertain Morgan's preference as to the attorney to represent him in the loan closing and that the mortgage loan was closed without attorney supervision. (R. p. 68.) The lack of attorney supervision by its nature tended to deprive Morgan of a meaningful choice about whether to enter into the transaction and tended to deprive him of fundamental fairness in the process of the transaction. See Simpson, 644 S.E.2d at 669; Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

In addition, Morgan's counterclaim alleges that "without the knowledge or permission of Morgan," Wells Fargo's employees either allowed others to or themselves "falsified and forged Morgan's signature on documents relating to the application for and origination of the subject mortgage loan." (R. p. 68.) A reasonable

inference to be drawn from that is that these people were trying to prevent Morgan from seeing the terms and content of those documents, from having a fair bargaining process and from having a meaningful choice about whether to enter into the loan. Another reasonable inference to be drawn from that is that, without a lawyer there to protect Morgan's interests, that plan worked.

The order that granted Wells Fargo's motion to dismiss took a quotation from an opinion by the Fourth Circuit Court of Appeals, discussing a novel question under West Virginia law, out of context, stating that "[f]or conduct to qualify as unconscionable inducement, it must be 'an affirmative misrepresentation or active deceit.' McFarland[,] 810 F.3d [at 277]." (R. p. 4.) The quotation from McFarland, presented in context, reads as follows:

> We of course leave to West Virginia law the precise contours of an unconscionable inducement claim, but it appears that it will turn not on status considerations that are outside the control of the defendant, but instead on affirmative misrepresentations or active deceit.

McFarland, 810 F.3d at 286.

The order then concludes "Morgan does not adequately allege any of these things." (R. p. 4.) As discussed above, however, he does. Morgan's counterclaim alleges that "without the knowledge or permission of Morgan," Wells Fargo's employees either allowed others to or themselves "falsified and forged Morgan's signature on documents relating to the application for and origination of the subject mortgage loan." (R. p. 68.) They did so while also depriving Morgan of his right to be represented by counsel, whose job it would be to make sure Morgan understood the

transaction. See Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. That is active deceit.

The question on a motion to dismiss a counterclaim is whether, in the light most favorable to the complainant and with every reasonable inference drawn in his favor, the counterclaim states any valid claim for relief. Charleston County School Dist., 348 S.C. at 424. Viewed in the light most favorable to Morgan, with all reasonable inferences drawn in his favor, the allegations of his counterclaim indeed state facts sufficient to constitute a cause of action for violation of the attorney preference statute coupled with inducement by unconscionable conduct. The circuit judge's decision to grant Wells Fargo's motion to dismiss was reversible error. That may be why he granted Morgan's motion to reconsider. (R. pp. 11-16.) Perhaps the circuit judge realized that he had very much misapprehended Morgan's argument. In the order that granted the motion to dismiss, the circuit judge wrote that "[e]ssentially, Morgan argues that the alleged violation of the Attorney Preference Statute renders his loan unconscionable and unenforceable." (R. p. 6.) That is not at all what Morgan argued, then or now. If all Morgan had were a mere violation of S.C. Code Ann. § 37-10-102, without more, he would not have a claim under § 37-10-105(C).

Morgan alleged facts sufficient to constitute a cause of action under S.C. Code Ann. § 37-10-105(C), and the three-year statute of limitations does not apply.

III. The decision to grant Wells Fargo's motion to dismiss was founded in a conflation of S.C. Code Ann. § 37-10-105(C) with the idea of a private right of action for the unauthorized practice of law.

The order that granted the motion to dismiss seemed at one point to treat Morgan as though he had asserted a cause of action for the unauthorized practice of

law. (R. pp. 6-7.) At no point was Morgan contending that there is a private right of action merely for the unauthorized practice of law or that the unauthorized practice of law, without more, renders this loan unenforceable. Rather, the closing of the loan without supervision by an attorney to protect Morgan's interests – which is indeed the unauthorized practice of law – is unconscionable conduct, and, when it is coupled with an attorney preference violation, *that* is something brings a claim within the ambit of S.C. Code Ann. § 37-10-105(C). As noted above, that depriving a mortgage loan borrower of counsel in the mortgage closing is unconscionable conduct is simply consistent with existing law. See Matrix, 714 S.E.2d at 534; Simpson, 644 S.E.2d at 669; Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434; Coffey, 698 S.E.2d 244, 248; S.C. Code Ann. §§ 37-1-102, 37-5-108(4)(a)(iv).

In Matrix, the Supreme Court held that mortgages closed through the unauthorized practice of law are *per se* unenforceable but also wrote "[w]e apply this ruling to all filing dates after the issuance of this opinion." 714 S.E.2d at 535. The Court later held in BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012), that the "filing date[]" in Matrix refers to the date the instrument was recorded in the land records. If a mortgage closed through the unauthorized practice of law was recorded before August 8, 2011, Matrix and Kinder appear to say that the mere fact that its closing was not supervised by an attorney, alone, does not make it unenforceable.

Matrix does not, and does not purport to, bar a claim for violation of the attorney-preference statute if the mortgage loan closing at issue occurred without the supervision of an attorney but the mortgage was recorded before August 8, 2011.

Neither Matrix, Kinder, nor Coffey addresses a claim for violation of S.C. Code Ann. § 37-10-102. None of these cases abrogated or limited any rights under S.C. Code Ann. § 37-10-105(C).

Under Matrix, if a mortgage was recorded after August 8, 2011, the mere fact that the closing was not supervised by an attorney makes it unenforceable, without proof of anything else. 714 S.E.2d at 535. Matrix does not address whether a mortgage may be declared unenforceable under any other law, such as under S.C. Code Ann. § 37-10-105(C), nor does it address any time constraints on a claim under that statute. It certainly does not validate or approve of the unauthorized practice of law in mortgage loan closings that occurred before August 8, 2011. Most importantly for our purposes, it does not hold that the unauthorized practice of law in a mortgage loan closing cannot constitute inducement by unconscionable conduct under S.C. Code Ann. § 37-10-105(C) if it occurred before August 8, 2011. To see such a proposition in Matrix is to see what is not there. 714 S.E.2d at 535.

IV. As a defendant in an action seeking to collect the subject mortgage debt, Morgan may raise a violation of S.C. Code Ann. § 37-10-102 regardless of the amount of time that has passed.

This is an action brought by Wells Fargo seeking to collect on the mortgage loan that is the subject of Morgan's attorney preference violation counterclaim. (R. pp. 25-30, 67, 68-69.) Accordingly, regardless of whether Morgan pled a claim under S.C. Code Ann. § 37-10-105(C), the circuit judge's initial decision to dismiss the counterclaim on the basis of the statute of limitations was error. The following language from S.C. Code Ann. § 37-10-105(A) plainly notes that a violation of the attorney preference statute, S.C. Code Ann. § 37-10-102, may be raised by a defendant

in a collection proceeding, such as this foreclosure action, regardless of whether a claim for that violation would otherwise be barred by the statute of limitations:

> No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. **This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.**

S.C. Code Ann. § 37-10-105(A) (emphasis added.)

Morgan is the defendant debtor asserting this violation in this action to collect a debt. (R. pp. 25-30, 67, 68-69.) Accordingly, his counterclaim would survive even if it did not allege unconscionability or inducement by unconscionable conduct – because it has a defensive function even at its most barebones. Id. His assertion of the violation of the attorney preference statute is not, and cannot be, time-barred in this action. Id. It was error for the circuit court to conclude otherwise. The circuit judge was right to grant Morgan's motion to reconsider and specifically note that "[t]his foreclosure action is an action to collect a debt brought against Morgan by Wells Fargo, so Morgan could raise a violation of S.C. Code Ann. § 37-10-102 in this case without regard to how much time has passed since the violation." (R. p. 14.)

V. The circuit judge erred relying on unpublished appellate opinions and opinions from trial courts and treating them as precedent.

Throughout the order that granted Wells Fargo's motion to dismiss, the circuit judge relied on trial-level and unpublished opinions, treating them as though they were

precedent. (R. pp. 4-8.) To do was error. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 554-56, 813 S.E.2d 292, 297-99 (Ct. App. 2018); Higgins v. Med. Univ. of S.C., 326 S.C. 592, 601, 486 S.E.2d 269, 273 (Ct. App. 1997). "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR.

Indeed, were the citations to unpublished opinions removed from that order, the appearance that there is precedent to support many of its stated propositions of law would evaporate. (R. pp. 4-8.) The judge cited unpublished opinions as precedent for the following propositions:

> In order to proceed under § 37-10-105(C), Morgan must properly allege either (1) substantive unconscionability—that the loan transaction itself is unconscionable, or (2) procedural unconscionability—that it was induced by unconscionable conduct. See, e.g., Boone v. Quicken Loans, Inc., No. 5:15-cv-04772-JMC, 2016 WL 3552025, at *4 (D.S.C. June 30, 2016).
>
> . . .
>
> First, Morgan does not allege that any of his loan's terms were so oppressive that no reasonable person would have accepted the agreement. Thus, Morgan does not allege substantive unconscionability as a matter of law. See, e.g., Mosley v. Quicken Loans, Inc., No. 1:16-cv-00384-JMC, 2016 WL 3551999, at *4 (D.S.C. June 30, 2016); see also Boone, 2016 WL 3552025, at *5; O'Neal v. Quicken Loans, Inc., No. 1:15-cv-03712-JMC, 2016 WL 3569402, at *6 (D.S.C. June 30, 2016).
>
> . . .
>
> Here, it is undisputed that the mortgage at issue was recorded in 2008. Complaint, ¶ 18; Amended Answer, ¶ 18. Thus, as a matter of law, the alleged unauthorized

> practice of law cannot support Morgan's Counterclaim, which seeks to prohibit Wells Fargo from enforcing the mortgage. See Deutsche Bank Nat'l Trust Co. v. Booms, No. 2015-UP-097, 2015 WL 793201, at *1 (Ct. App. Feb. 25, 2015) (affirming circuit court's rejection of unclean hands defense based upon alleged unauthorized practice of law because the subject mortgage was recorded before August 8, 2011).
>
> . . .
>
> Wells Fargo cited numerous decisions from the U.S. District Court for the District of South Carolina rejecting procedural unconscionability claims based upon alleged violations of the Attorney Preference Statute. See, e.g., Mosley, 2016 WL 3551999, at *3-4 (rejecting the argument that a loan was induced by unconscionable conduct simply because the lender allegedly violated the Attorney Preference Statute); Boone, 2016 WL 3552025, at *5 (rejecting the argument that a loan was induced by unconscionable conduct simply because the lender allegedly violated the Attorney Preference Statute and applying the three-year statute of limitations to the claim). Wells Fargo also pointed to Deutsche Bank Nat'l Trust Co. v. Booms, 2015 WL 793201. There, although the South Carolina Court of Appeals did not directly address the issue, it held that the circuit court did not err in holding that the subject note and mortgage were not unconscionable, even though the lender violated the Attorney Preference Statute.
>
> . . .
>
> Morgan has not stated a procedural unconscionability claim. See, e.g., Boone, 2016 WL 3552025, at *5 ("The facts as alleged indicate that Plaintiff applied for the loan with Defendant. There is no allegation that Plaintiff chose to apply for the loan based on statements made, or conduct, by Defendant regarding Plaintiff's ability to choose an attorney for closing. Therefore, Plaintiff has not stated a claim for unconscionable inducement."); Hosey v. Quicken Loans, Inc., No. 1:17-cv-02060-JMC, 2018 WL 1471891, at *5 (D.S.C. Mar. 26, 2018) (same).

(R. pp. 4-5, 7, 8.)

The legal propositions that circuit judge impermissibly found "authority" for in these unpublished opinions were the very basis of his decision to grant the motion to dismiss. (R. pp. 4-8.) Treating them as though they were precedent, he based his decision that Morgan had not pled facts sufficient to constitute a cause of action under S.C. Code Ann. § 37-10-105(C) on these unpublished opinions. (R. pp. 4-5, 7, 8.) He was wrong to do so, and he was right to grant Morgan's motion to reconsider and enter a decision that was not grounded in opinions that have no precedential value. (R. pp. 11-16.)

VI. The circuit judge erred in applying to heightened pleading standard for fraud to Morgan's counterclaim. Morgan did not plead and was not attempting to plead a fraud claim.

When the circuit judge granted Wells Fargo's motion to dismiss, he wrote that he did so because Morgan did not plead facts sufficient to support the nine elements of fraud with particularity. (R. pp. 5-6.) That was error.

The reliance in the order that granted the motion to dismiss on the standard for pleading a fraud claim was misplaced and, indeed, confusing. Morgan did not plead a fraud claim and was not trying to do so. (R. pp. 64-69.) The order that granted the motion to dismiss conflated *inducement* with *fraud*. (R. pp. 5-6.) *Inducement* and *fraud* are not the same things. *Inducement* is "[t]he act of process of enticing or persuading another person to take a certain course of action." Black's Law Dictionary at 845. Fraud, on the other hand, is a tort with nine elements: "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate

injury." Mutual Savings and Loan Ass'n. v. McKenzie, 274 S.C. 630, 632, 266 S.E.2d 423 (1980). Fraudulent inducement is a kind of inducement, but it is not the *only* kind of inducement.

The heightened standard of pleading with particularity applies to claims of fraud. Rule 9(b), SCRCP. It does not apply to every claim involving inducement. Id. It does not apply to a claim under S.C. Code Ann. § 37-10-105(C). Rule 9(b), SCRCP. When the circuit court applied the standard for pleading a fraud claim to a different kind of claim, that was error, as was its evaluation of whether Morgan pled facts to support the elements of fraud. The circuit court initially confused Morgan's claim with a fraud claim, which has different elements and a different pleading standard. The circuit court was right to grant Morgan's motion to reconsider and specifically note that the fraud pleading standard "is not applicable to the counterclaim alleged." (R. p. 11.)

VII. Even if Morgan's pleading were deficient, the court should have allowed him to amend.

Morgan pled facts sufficient to support his counterclaim. Even if this court disagrees, however, he should be allowed to amend to do so.

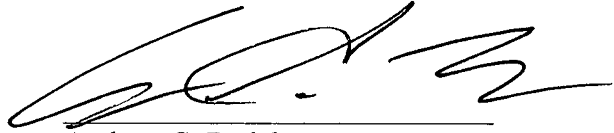
In the order that granted the motion to dismiss, the circuit judge dismissed the counterclaim with prejudice. (R. p. 9.) When a dismissal is done "under Rule 12(b)(6) for failure to state a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint" or, as in this case, counterclaim. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006); accord Dockside Assn. v. Detyens, Simmons & Carlisle, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988). The Supreme Court recently noted that "[u]nder Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with

prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted." Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). There was no reason for the circuit court to deviate from applying these same principles here. The circuit judge did not decide that it was certain that no set of facts exists on which Morgan could be granted relief. (R. pp. 1-9.)

CONCLUSION

The order purporting to deny Morgan's motion to reconsider is void. (R. p. 17.) The status of Morgan's counterclaim is that it is pending, as his motion to reconsider its dismissal was granted. (R. pp. 11-16.) Accordingly, this court should so state and dismiss this appeal. In the alternative, the circuit court still committed reversible error in granting Wells Fargo's motion to dismiss, so, in the event this court does not determine the order purporting to deny the motion to reconsider to be void, this court should still reverse and remand because Morgan pled facts sufficient to constitute a cause of action. In the further alternative that this court believes that Morgan's pleading was not sufficient, he is entitled to amend it, and the court should reverse the dismissal with prejudice and remand this case for Morgan to have an opportunity to amend his pleading.

Respectfully submitted,



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January 13, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Doyet A. Early III, Circuit Judge

RECEIVED
JAN 13 2020
SC Court of Appeals

Appellate Case No. 2018-002068

Wells Fargo Bank, N.A.,...Respondent,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department of Revenue; Linda Lawrence Bowen; Defendants,

Of whom Michael G. Morgan is the...Appellant.

CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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