

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-In-Equity
Trial Court Case No. 2011-CP-42-0500

Appellate Case No. 2019-000404

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SC Court of Appeals

Super Suds, LLC, Appellant,

v.

Carolina Properties Holdings, LLC, Walter W. Parker, IV, the United States of America by
and through the U.S. Small Business Administration, Carolina Clean Greer I, LLC, and
Community Development & Improvement Corporation, Defendants,

Of Which Carolina Properties Holdings, LLC, and Walter W. Parker, IV are the Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR BY FINDING THAT RULE 43(k), SCRCP, WAS INAPPLICABLE TO THE PURPORTED SETTLEMENT OF THIS FORECLOSURE ACTION BETWEEN AND AMONG PARTIES WHO WERE REPRESENTED BY COUNSEL AND THOSE WHO WERE NOT REPRESENTED BY COUNSEL?
- II. DID THE TRIAL COURT ERR BY FAILING TO CONSIDER FACTS OPPOSING RESPONDENTS' CONTENTION OF AN ENFORCEABLE SETTLEMENT AGREEMENT WHICH WERE ALREADY IN THE TRIAL COURT'S RECORD OF APPELLANT'S POSITION PRESENTED BY HILL, AND BY REFUSING TO ACCEPT DIRECT TESTIMONY FROM HILL IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, BOTH AT THE HEARING AND IN GRANTING RESPONDENTS' MOTION TO STRIKE HILL'S AFFIDAVIT?
- III. DID THE TRIAL COURT ERR BY VIOLATING RULE 56, SCRCP, WHEN IT REFUSED APPELLANT ANY OPPORTUNITY TO OFFER EVIDENCE IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?
- IV. DID THE TRIAL COURT ERR BY GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, BECAUSE THERE WAS A GENUINE ISSUE OF MATERIAL FACT?
- V. DID THE TRIAL COURT ERR BY GRANTING RESPONDENTS EQUITABLE RELIEF IN THIS FORECLOSURE ACTION, WHEN IT IS UNDISPUTED THAT THE PROPERTY OWNER RESPONDENT, CPH, ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW?

STATEMENT OF THE CASE

This case arises from Appellant Super Suds, LLC's attempt to foreclose a mortgage (the "Mortgage") on real property owned by Respondent Carolina Properties Holdings, LLC ("CPH"). (R. pp. 696-97; pp. 702-03, ¶¶ 2-8.) The Mortgage secures a promissory note (the "Note") CPH executed with Branch Banking & Trust Company ("BB&T") in late 2005 to obtain a commercial loan from BB&T. (R. p. 449, line 13-p. 453, line 5; pp. 532-38; pp. 539-44.) Appellant purchased the Mortgage and the Note (collectively, the "Loan") from BB&T in September 2011, after BB&T initiated this action (the "Foreclosure Action"). (R. p. 34; p. 702, ¶ 5; p. 306, lines 3-6; p. 314, lines 2-6; p. 326, lines 6-8; pp. 343-360; p. 503, line 20-p. 504, line 13; p. 620.) Attorney Allen Hill represented Appellant in that transaction. (p. 702, ¶ 6.)

On February 2, 2011, BB&T filed the Foreclosure Action to foreclose the Mortgage against CPH, Respondent Walter Wellington Parker, IV, and two other entities holding lien interests in the Property: the United States, by and through the Small Business Administration (the "SBA"), which holds a subordinate mortgage on the Property; and Community Development & Improvement Corporation ("CDIC"), which previously held a security interest on equipment installed on the Property, through a lien that is now expired. (R. pp. 33-34.) After Appellant purchased the Loan, Appellant was substituted for BB&T as the plaintiff in the Foreclosure Action, and Hill was substituted as Appellant's counsel. (R. p. 14.)

Respondents contend that Appellant cannot foreclose on the Mortgage because Hill negotiated with Respondents in 2011 a settlement agreement which was consummated when Parker executed and sent Hill a Deed in Lieu of Foreclosure (the "Deed in Lieu") dated October 24, 2011. (R. pp. 162-63.) Respondents claim that through this process, they conveyed title to the Property to Appellant and extinguished the Mortgage. (R. pp. 162-63.)

Appellant maintains that the settlement agreement Hill negotiated with Respondents in 2011 was never consummated and does not bar the Foreclosure Action, because that agreement contains a condition precedent that has not been met: specifically, that Hill would resolve the SBA's lien interest in the Property for \$2,000, before and in order for the Deed in Lieu that Parker signed to be accepted by Appellant and to settle the Foreclosure Action. (R. p. 649; pp. 701-03, ¶¶ 1, 8.) Because Hill was unable to resolve the SBA lien for \$2,000, Appellant never accepted the Deed in Lieu; so, the Foreclosure Action is not settled and remains pending. (R. p. 649; pp. 701-03, ¶¶ 1, 8.)

The issues presented in this appeal arose when Respondents filed a Rule 12(b)(6), SCRPC, Motion to Dismiss the Foreclosure Action, arguing that Appellant lacks any grounds for foreclosing on the Mortgage because it accepted the Deed in Lieu in settlement of the claims in 2011. (R. p. 100; p. 162.) In opposition to Respondents' position, and because the settlement agreement's condition precedent of lien resolution never was satisfied, Appellant moved under Rule 43(k), SCRPC, for a declaration that the parties' settlement agreement has not been consummated – which declaration should defeat the basis of Respondents' Motion to Dismiss the Foreclosure Action. (R. p. 124; pp. 128, 134.) The trial court's ensuing decision to convert Respondents' Motion to Dismiss into a summary judgment motion, and its evidentiary rulings regarding and resulting from that decision, led to the errors Appellant now submits for this Court's decision. (R. pp. 221-28; pp. 215-19.)

STATEMENT OF FACTS

In 2005, Parker, who was a real estate developer and broker, planned to open an automatic car wash business in Spartanburg County, South Carolina. (Appx. to R. p. 2; R. p. 414, line 22-p. 415, line 4.) Parker had extensive experience in business management and real estate transactions,

and he believed a car wash business in the Upstate would be profitable. (Appx. to R. p. 2; p. 413, line 25-p. 420, line 10.) In addition to his having executive level experience in real estate development, financing, foreclosures, and sales across nine states, Parker had spent six years working at a large mortgage holding company, where he negotiated with defaulting borrowers to resolve foreclosure actions. (R. p. 413, line 25-p. 420, line 10.) Parker also owned multiple rental properties, including an apartment building. (R. p. 412, line 19-p. 413, line 11.) Notably, Parker is not a licensed attorney in South Carolina. (R. p. 505, lines 12-14.)

To start his car wash business, Parker formed two entities: CPH and Carolina Clean Greer I, LLC ("Carolina Clean"). (Appx. to R. p. 2; R. p. 420, line 11-p. 422, line 10.) In August 2005, Parker used CPH to purchase the Property for \$212,000 in cash, and he planned to construct the car wash there. (Appx. to R. p. 2; R. 441, line 5- p. 443, line 9; pp. 573-78). CPH obtained a \$585,000 loan from BB&T to construct a two-bay car wash on the Property, purchase business equipment, and operate the business. (R. p. 447, lines 4-7; p. 449, lines 7-9; p. 471, line 25-p. 472, line 3; pp. 539-44.) In exchange for that loan, CPH executed the Mortgage and the Note in favor of BB&T. (R. p. 449, line 13-p. 453, line 5; pp. 532-38.) Additionally, Parker personally guaranteed the Note. (R. p. 453, lines 10-19.)

Parker opened his car wash for business in early 2007. (R. p. 472, lines 18-20; p. 518, lines 16-24.) The business struggled to make money. (Appx. to R. p. 2.) In December 2007, CPH borrowed \$133,000 from the SBA to make payments to BB&T under the Note. (Appx. to R. p. 2; R. p. 471, line 10- p. 472, line 11.) Later, CPH modified the SBA loan to borrow another \$26,500 from the SBA for the same purpose. (Appx. to R. p. 2; R. p. 471, line 10- p. 474, line 13.) In both instances, CPH granted the SBA a mortgage on the Property securing the SBA loan. (R. p. 471, line 10-p. 473, line 15.) Parker and his wife also personally guaranteed the SBA loan. (R. p. 471,

line 10-p. 474, line 16.) Around 2009, Parker used Carolina Clean to borrow \$50,000 from CDIC. (R. p. 476, lines 2-22.)

On October 19, 2010, CPH defaulted on the Note. (Appx. to R. p. 2-3; R. p. 481, lines 14-17.) On February 2, 2011, BB&T filed the Foreclosure Action against CPH and Parker to foreclose on the Mortgage. (R. p. 34; Appx. to R. p. 3.) On April 21, 2011, Parker filed an Answer and Counterclaim in the Foreclosure Action *pro se*, and purportedly on behalf of CPH. (R. p. 429, line 19-p. 430, line 3; p. 482, line 20-p. 483, line 10.)

About four months after the Foreclosure Action was filed, Parker's bankruptcy lawyer, Attorney Leon Jones of Jones & Walden in Atlanta, contacted BB&T about potentially settling this Foreclosure Action. (R. p. 492, line 5-p. 493, line 22.) On August 9, 2011, BB&T responded with an offer to sell the Note to an independent buyer for \$200,000 pursuant to a Note Purchase and Sale Agreement, and subject to the condition precedent that both CPH and Parker execute a settlement agreement with BB&T obligating them to dismiss their counterclaims against BB&T with prejudice. (R. p. 494, line 23-p. 501, line 10.)

Parker then approached Ken Howard, member/manager of Appellant, about purchasing the car wash. (R. p. 517, lines 21-23; p. 519, lines 3-7; R. p. 296, lines 20-23.) Appellant offered to purchase the car wash for \$200,000. (R. p. 519, line 12- p. 520, line 8; R. p. 296, line 20-p. 300, line 20.) After discussing the matter with Howard, BB&T agreed to sell the Loan to Appellant for \$200,000. (R. p. 298, lines 3-17.) Appellant was represented by Hill in its negotiations with BB&T. (R. p. 702, ¶ 6.)

While Hill negotiated on behalf of Appellant with BB&T over purchasing the Loan, Hill simultaneously negotiated with Parker to resolve the Foreclosure Action once Appellant purchased the Mortgage. (R. p. 702, ¶¶ 1, 6.) On August 18, 2011, Parker advised Hill in an email that Greg

Dixon, a Lead Loan Specialist at the SBA, had stated that the SBA would take \$2,000 to “go away” in the Foreclosure Action. (R. p. 507, line 20-p. 508, line 12.) Hill interpreted that email to mean the SBA would take \$2,000 to release its mortgage lien, not to satisfy the SBA debt. (R. p. 705, ¶ 20.)

On September 19, 2011, BB&T sent Parker an unsigned Settlement Agreement and Release of Claims, and an unsigned Stipulation of Dismissal of Counterclaims for Parker to execute. (R. p. 496, line 1- p. 497, line 7.) The next day, Parker emailed BB&T’s counsel to confirm that BB&T would sell to Appellant the right to foreclose on the Property in addition to the BB&T Note. (R. p. 497, line 15-p. 499, line 16.) BB&T’s counsel confirmed. (R. p. 497, line 15-p. 499, line 16.) Later that day, Parker emailed Hill to inform Hill that Parker was about to execute the settlement agreement and stipulation of dismissal, and to confirm that Appellant would neither seek a deficiency judgment against CPH or Parker, nor file an IRS Form 1099 for the forgiveness of debt. (R. p. 499, line 19-p. 501, line 10.) Hill confirmed. (R. p. 499, line 19-p. 501, line 10.)

During the course of Hill’s and Parker’s various negotiations, they agreed as follows: (1) CPH would execute and deliver a deed in lieu of foreclosure to Hill, who would hold that deed in trust while Hill negotiated lien releases with the SBA and the CDIC; and (2) if Hill was unable to obtain those lien releases, Hill would not deliver the deed in lieu to Appellant, and title to the Property would not be transferred to Appellant. (R. pp. 702-03, ¶ 8.) Hill never delivered the Deed in Lieu of Foreclosure to Appellant, and Appellant never received it. (R. pp. 701-02, ¶ 1.)

On September 16, 2011, Appellant purchased the Note and the Mortgage from BB&T for \$200,000. (R. p. 702, ¶ 5; R. p. 306, lines 3-6; p. 314, lines 206; p. 326, lines 6-8; pp. 343-360; p. 503, line 20-p. 504, line 13; p. 620.) One week later, Parker executed the Settlement Agreement

with BB&T on behalf of CPH and himself. (Appx. to R. p. 3; R. p. 501, line 13-p. 506, line 6.) The Settlement Agreement with BB&T required Parker and CPH to dismiss their counterclaims in the Foreclosure Action, and provided: "Borrower and Guarantor acknowledge the Bank is not releasing its claim against Borrower and Guarantor under this Agreement." (Appx. to R. p. 3; p. 501, line 13-p. 506, line 6.) Parker mailed the Settlement Agreement to BB&T's counsel. (Appx. to R. p. 3; R. p. 501, line 13-p. 506, line 6.)

As a result of the communications between Hill and Parker, Hill prepared the Deed in Lieu, which Parker executed on behalf of CPH on October 21, 2011. (R. pp. 701-02, ¶¶ 1, 8; R. p. 507, line 19-p. 509, line 25; p. 311, line 18-p. 314, line 20.) After execution for CPH, Parker delivered the Deed in Lieu to Hill to hold in trust. (R. pp. 701-02, ¶¶ 1, 8; p. 507, line 19-p. 509, line 18; p. 311, line 18-p. 314, line 20.) Several days later, Parker delivered the key to the car wash on the Property to Howard. (R. p. 485, lines 8-21.) Parker was not authorized by CPH to convey the Property by any LLC resolution, and he is also unaware whether he signed an affidavit in connection with the Deed in Lieu which referenced other liens on the Property or any affidavits regarding the value of the Property, or obtained a certificate of compliance from the South Carolina Department of Revenue for the purported transfer of the Property. (R. p. 510, line 15-p. 512, line 20.)

On October 31, 2011, Appellant was substituted for BB&T as the plaintiff in the Foreclosure Action, and Hill was substituted as Appellant's counsel. (R. p. 14.)

On September 25, 2014, the Foreclosure Action was referred to the Spartanburg County Master in Equity, via an Order of Reference. (R. p. 12.) On August 9, 2016, Attorney Charles D. LeGrand appeared as co-counsel with Hill for Appellant, and both Hill and LeGrand continued to

represent Appellant in the Foreclosure Action throughout its pendency in the trial court.¹ (R. p. 14.)

On or around August 29, 2016, Hyde Law Firm, P.A., first appeared as counsel for CPH and Parker, via a Notice of Appearance. This was the first appearance of South Carolina licensed counsel for CPH or Parker.² (R. p. 138.) Respondents concede that they were not represented by counsel at the time of execution of the Deed in Lieu dated October 24, 2011, which Respondents contend ended the legal basis for this Foreclosure Action, and Respondents further concede that they did not retain South Carolina licensed counsel in this Action until they retained Hyde Law Firm in 2016. (R. p. 138.)

On April 5, 2017, Respondents filed a Motion to Dismiss, pursuant to Rule 12(b)(6), SCRCPP. (R. p. 100.) The Motion was untimely under Rule 12, SCRCPP, because it was filed nearly six full years after Respondents filed their answer. (R. p. 100.) On May 26, 2017, Respondents filed a Motion to Disqualify Hill as Appellant's counsel of record, and a Motion to Compel Discovery from Appellant. (R. p. 103; p. 106.) The trial court heard these motions, and on September 1, 2017, the trial court issued an Order denying Respondents' Motion to Disqualify Hill. (R. p. 18.)

¹ This Court relieved LeGrand and Hill as counsel for Appellant on June 4, 2019.

² Respondents represented to the trial court, and the trial court found, that Respondents were represented by Attorney Leon Jones of Jones & Walden, an Atlanta, Georgia firm, "during the initial stages of [this action]; however, Jones ceased representation during the [BB&T] negotiations." (R. p. 138; p. 34.) Jones never made an appearance with the trial court, and Jones is not listed in the directory of members of the South Carolina Bar.

ARGUMENT

I. The Trial Court Erred By Finding That Rule 43(k), SCRPC, Does Not Apply To The Purported Settlement Of The Foreclosure Action Between And Among Parties Represented By Counsel And Parties Who Were Not Represented By Counsel.

A. Standard of Review

Whether Rule 43(k), SCRPC, is applicable to a *pro se* litigant constitutes a question of law. *See Personal Care, Inc. v. Theos*, 426 S.C. 78, 85, 825 S.E.2d 281, 284 (Ct. App. 2019) (finding analysis of application of rule of civil procedure to be question of law). “Where [an] action presents a question of law, . . . [the Court of Appeals’] review is plenary and without deference to the trial court.” *Crossman Cmty. Of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 518, 769 S.E.2d 453, 459 (Ct. App. 2015). Accordingly, in this matter, the trial court’s ruling on the applicability of Rule 43(k), SCRPC, to *pro se* litigants is subject to *de novo* review. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012).

B. The Deed In Lieu is a Purported Agreement Affecting the Proceedings in the Foreclosure Action, as Indicated by the Express Title of the Document.

Rule 43(k), SCRPC, provides as follows:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, **or reduced to writing and signed by the parties and their counsel.** Settlement agreements shall be handled in accordance with Rule 41.1, SCRPC.

Rule 43(k), SCRPC (emphasis added).

The trial court echoed this holding in its September 1 Hill Order, which stated that “[i]f CPH and Parker move to compel a purported settlement, the Court will consider said motion, and will determine what information it requires, if any, of Parker, Hill or any other witness, as to

whether in 2011 an enforceable settlement agreement was made under Rule 43(k), SCRCF.” (R. p. 16.) The trial court later diverged from this ruling, and erred by finding that Rule 43(k), SCRCF, does not apply to an alleged settlement agreement in a civil action in which some parties are not represented by counsel. (R. p. 38.) The trial court therefore also erred in failing to determine whether these parties entered into a binding settlement agreement under Rule 43(k), SCRCF. (R. p. 38.)

Respondents contend that they offered the Deed in Lieu as a resolution of this action. (R. to R. p. 3.) The Deed in Lieu was signed by Parker for CPH on October 24, 2011, over eight months after initiation of the Foreclosure Action. (R. p. 204; Appx. to R. p. 3.) Accordingly, the Deed in Lieu was offered during pending litigation to attempt to create an agreement affecting this litigation.

In Parker’s deposition, which was in the record for the July 17, 2018 hearing, he admitted that there was no settlement agreement that CPH or he had with Appellant for this case. (R. p. 502, lines 17-20; p. 55.) Further, in deposition testimony which was presented to the trial court prior to the hearing on the Motion for Declaration pursuant to Rule 43(k), SCRCF, Howard, the member and manager of Appellant, testified that he had never heard of a deed in lieu of foreclosure. (R. p. 311, lines 9-11.) Howard further stated that the purpose of purchasing the Loan and continuing legal proceedings was to have a clear deed for the Property. (R. p. 311, lines 12-17.)

C. Rule 43(k), SCRCF, Applies in All Cases Where There is a Pending Action, Regardless of Whether the Parties to the Action are Represented by Counsel.

The very purpose of Rule 43(k), SCRCF, is to prevent disputes as to the existence and terms of agreements regarding pending litigation. *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006). No agreement affecting a

pending proceeding is binding unless one of the conditions of Rule 43(k), SCRCP, is met. *Id.* at 637, 627 S.E.2d at 725.

Our Supreme Court has clearly stated that “Rule 43(k), SCRCP, is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation . . . and it is applicable to settlement agreements.” *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 493-4, 458 S.E.2d 533, 534 (1995). In essence, Rule 43(k), SCRCP, operates as a statute of frauds for civil action settlement agreements, requiring agreements to be in writing and signed by all parties, or made in court by stipulation or statement on the record, to avoid confusion as to the specific terms of settlement agreements. *Id.* As with the Statute of Frauds, a settlement agreement in pending litigation is not binding on the parties to it, unless the terms of Rule 43(k), SCRCP, are met. *Id.* Part of the purpose of Rule 43(k), SCRCP, in a case like this is to be certain that a party and that party’s attorney understand and agree on the term, or terms, at issue in a civil action. *Id.* The trial court has erred by not following Rule 43(k), SCRCP, to protect Appellant’s interests in this case.

In opposition to the Motion for Declaration Under Rule 43(k), SCRCP, Respondents argued that Rule 43(k), SCRCP, does not apply to what they contended to be an agreement ending the Foreclosure Action, solely because CPH did not have counsel to sign a document completing a purported settlement agreement. (R. p. 40, line 23-p. 41, line 7.) Essentially, Respondents contend that they should benefit from their failure to obtain counsel, even when the corporate defendant, CPH, was required to do so. In fact, counsel for Respondents argued that “a Rule that is intended to motivate counsel to place an agreement on the record shouldn’t be used against Walt Parker when he was *pro se*.” (R. p. 40, lines 16-17.) Of course, Respondents’ counsel and the trial court ignored the fact that Parker was not allowed to represent an LLC *pro se* in a proceeding

pending before the Master in Equity. *See Renaissance Enters., Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 515 S.E.2d 257 (1999) (finding corporate entity must be represented by counsel in circuit or appellate court). So, Respondents argued, and the trial court erroneously found, that Parker's failure to comply with the rules of practice in South Carolina courts acts to Parker's benefit, by barring the application of Rule 43(k), SCRPC, to a document which Parker contends resolves the claims against him. (R. p. 38.)

The trial court held that Rule 43(k), SCRPC, is inapplicable in this case, contradicting its ruling in its September 1 Hill Order, and stating:

Rule 43(k), SCRPC, is not applicable because the [Respondents], Parker and CPH, were unrepresented during the negotiations with attorney Allan Hill and at the issuance of the Deed in Lieu of Foreclosure. The burden of compliance with Rule 43(k) is placed on attorneys rather than unrepresented parties. Furthermore, the rules of statutory construction show that Rule 43(k) should not apply to pre se litigants. The plain and ordinary meaning should be given to Rule 43(k), and accordingly the rule should be applied to "agreement[s] between counsel.

(R. p. 38.) In the September 1 Hill Order, the trial court found that "[n]o agreement affecting this proceeding is binding unless one of the conditions of Rule 43(k), SCRPC, is met." (R. p. 16.) Respondents never moved to reconsider the September 1 Hill Order, and the trial court never expressly modified that Order.

Respondents provide no legal support for why their failure to retain counsel bars application of a rule which the trial court recognized is intended "to prevent disputes as to the existence and terms of agreements regarding pending litigation." (R. p. 16, *citing Farnsworth*, 367 S.C. at 637, 627 S.E.2d at 725.) The trial court should have found that Rule 43(k), SCRPC, applies to any settlement agreement modifying this case after filing, including the purported Deed in Lieu and related terms, including but not limited to lien releases. Further, Respondents argument that Rule 43(k), SCRPC, should not apply to Parker and CPH because Parker is not a lawyer

ignores the fact that Parker's extensive experience in banking and finance renders him quite knowledgeable regarding foreclosure proceedings and the requirements and benefits of representation by counsel. (R. p. 437, line 7- p. 441, line 9.) Parker chose not to retain counsel to represent CPH or himself, and he is bound by that decision.

D. The Trial Court's Ruling on the Motion to Disqualify Hill is Binding on the Court and Parties.

On September 1, 2017, the trial court made findings of fact leading to a conclusion of law stating that: "[A]ll of [Attorney Allan] Hill's actions on behalf of [Appellant] have been for the purpose of prosecuting this Action, including possibly resolving elements of this Action." (R. p. 15.) Further, the trial court ruled that "[n]o agreement affecting this proceeding is binding unless one of the conditions of Rule 43(k), SCRCP, is met." (R. p. 16.) The trial court further found that "[i]f CPH and Parker move to compel a purported settlement, the Court will consider said motion, and will determine what information it requires, if any, of Parker, Hill, or any other witness, as to whether in 2011 an enforceable settlement agreement was made under Rule 43(k)." (R. p. 16.)

Respondents never moved to reconsider the findings of the September 1 Hill Order, and they litigated the case for nearly a year before challenging the applicability of Rule 43(k), SCRCP, to their allegations of a settlement agreement. Respondents waived any challenge to the applicability of Rule 43(k), SCRCP, by not raising the objection within ten days of the September 1 Hill Order.

E. Rules of Statutory Construction Dictate that Rule 43(k), SCRCP, Applies to All Parties, Whether *Pro Se* or Not.

Rule 43(k), SCRCP, is contained within Rule 43, SCRCP, which is entitled "Conduct of Trial." Rule 43, SCRCP. The rule sets procedures by which courts are to conduct trials, and it is

applicable to all persons trying cases in the Circuit Courts, whether they are attorneys or *pro se* litigants. See *State v. Burton*, 356 S.C. 259, 265, 589 S.E.2d 6, 9 n.5 (2003) (noting that *pro se* litigant who knowingly elects to represent himself assumes full responsibility for compliance with substantive and procedural requirements of law).

“The cardinal rule of statutory interpretation is to ascertain the intent of the legislature.” *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005). Courts must apply “the same rules of construction used to interpret statutes” in interpreting the Rules of Civil Procedure. *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). The language of a statute “must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.” *Liberty Mut.*, 363 S.C. at 622, 611 S.E.2d at 302. In evaluating the meaning of a statute, “the terms [analyzed] must be construed in context and their meaning determined by looking at other terms used in the statute.” *Id.*, quoting *Hinton v. S.C. Dep’t of Prob., Parole and Pardon Servcs.*, 357 S.C. 327, 332-33, 592 S.E.2d 335, 338 (Ct. App. 2004). “Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction.” *Id.* at 623, 611 S.E.2d at 302, citing *Tillotson v. Keith Smith Builders*, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004).

1. Reading Rule 43, SCRCP, as a Whole, it is Clear that the Term “Counsel” Applies to the Person Litigating the Case, Regardless of Whether The Person is a Licensed Attorney.

Subsections (g), (h), and (i), and (k) of Rule 43, SCRCP, use the term “counsel” to describe actions taken in relation to the trial of a case. Rule 43, SCRCP. These provisions dictate the rules for opening statements, examination of witnesses, argument, and agreements affecting the case.

Id. There is no reasonable interpretation of subsections (g), (h), and (i), which would render those provisions applicable only to attorneys acting as counsel. This is because *pro se* litigants are also expected to make opening statements limited to the facts of the pleadings and the theory of the case, to have only one person examine or cross-examine witnesses, and to limit their arguments according to court rules. *Id.* Read with Rule 43, SCRCF, as a whole, Rule 43(k), SCRCF, also requires that the provision governing settlement agreements requires signatures by all parties to the agreement – and the counsel representing those parties, if the parties are not represented by counsel. *Id.*

The trial court stated:

As to [Appellant's] motion relating to the 43(k), I am going to find that 43(k) is not applicable to the present case given the fact that there were not two (2) attorneys involved. Mr. Parker was unrepresented at the point of that – that point in time where the agreement was reached.

(R. p. 657, line 25-p. 658, line 3.) The trial court failed to note that CPH was not allowed to be represented by a non-attorney in the Foreclosure Action.

2. Respondents have Provided No Signed Document or Statement of Affirmation by Appellant Related to the Purported Settlement Agreement.

Respondents have conceded that there was no settlement made in court or noted on the record. (R. p. 641, lines 1-2.) Respondents also cannot identify any document signed by anyone on behalf of Appellant to settle and dismiss this Foreclosure Action, but they then argued that the actions of Appellant's counsel, without written or oral affirmation of Appellant, bind Appellant in this litigation. (R. p. 641, lines 3-22.) Further, Respondents concede that the Deed in Lieu does not contain signatures of Howard, member and manager of Appellant, or Hill, Appellant's counsel at the time of the execution of the Deed in Lieu. (R. p. 508, line 25-p. 509, line 20.) Parker

admitted he has no signed settlement agreement with Appellant. (R. p. 512, lines 17-20.)

Respondents' contention that Appellant's counsel can bind Appellant, without meeting the requirements of Rule 43(k), SCRCP, contradicts our Supreme Court's evaluation of the purpose and function of Rule 43(k), SCRCP. The Supreme Court has held that "[t]he intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered [or to an agreement signed by the parties and their counsel.]"³ *Ashfort*, 318 S.C. at 495, 458 S.E.2d at 535. As the *Ashfort* court noted:

[T]he purpose of rules such as Rule 43(k) is . . . to prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this nature.

Id. Here, Respondents have tied up the trial court and this appellate court in interpreting the meaning of the delivery to an attorney of record an unrecorded deed in lieu, because there is no Rule 43(k)-compliant agreement. Without such an agreement, there is no binding agreement that affects this litigation, or requires dismissal of this Foreclosure Action. Rule 43(k), SCRCP.

The absurdity of Respondents' position is apparent if the Court examines the situation that would exist if the parties' roles were reversed. A court would never bind a *pro se* party to a purported settlement agreement, if the opposing, represented party sought to enforce a purported settlement agreement which did not meet the requirements of Rule 43(k), SCRCP. The primary

³ Following the *Ashfort* opinion, Rule 43(k), SCRCP, was amended in 2009 allowing agreements reduced to writing and signed by the parties and their counsel to be binding agreements affecting pending litigation. Rule 43, SCRCP, Note to 2009 Amendment.

purpose of Rule 43(k), SCRPC, is to provide absolute clarity in civil actions among parties with inherently opposing positions, and to prevent the court from having to “make” or “divide” agreements among those litigating parties. *Ashfort*, 318 S.C. at 495, 458 S.E.2d at 535. Rule 43(k), SCRPC, is especially important in protecting *pro se* litigants in their negotiations with counsel representing opposing parties.

Respondents’ interpretation of Rule 43(k), SCRPC, is detrimental to all litigants – represented and unrepresented alike – and to the consistent and efficient administration of justice in South Carolina. Because the parties did not make a settlement agreement which is enforceable under Rule 43(k), SCRPC, all of Respondents’ Motions should be denied, and this Action should be remanded for the trial of Appellant’s foreclosure claims.

II. The Trial Court Erred By Failing To Consider Facts Opposing Respondents’ Contention Of An Enforceable Settlement Agreement Which Were Already In The Court’s Record Of Appellant’s Position Presented By Hill, And By Refusing To Accept Direct Testimony From Hill In Opposition To The Motion For Summary Judgment, Both At The Hearing And In Granting Respondents’ Motion To Strike.

A. Standard of Review

Typically, the trial court’s admission or exclusion of evidence is subject to an abuse of discretion standard. *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual considerations, is without evidentiary support.” *Id.*

The trial court’s consideration of the admissibility of Hill’s testimony was made in the context of a Motion for Summary Judgment. (R. p. 655, line 25-p. 656, line 17.) Rule 56(e), SCRPC, requires only that opposing affidavits “be made on personal knowledge, [that they] set

forth such facts as would be admissible in evidence, and [that they] show affirmatively that the affiant is competent to testify to the matters stated therein.” *Douglas*, 411 S.C. at 316, 768 S.E.2d at 237. “When ruling on a motion for summary judgment, the trial judge must consider *all* of the documents and evidence *within the record*, including pleadings, depositions, answers to interrogatories, admissions of file and affidavits.” *Higgins v. Med. Univ. of South Carolina*, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997). As noted above, the trial court failed to afford Appellant any opportunity to offer evidence in opposition to the Motion to Dismiss which it converted to a Motion for Summary Judgment, and such action was an error of law, because the opportunity is mandated by Rule 12(c), SCRPC.

B. Hill’s Testimony was Rendered Relevant and Admissible by the Trial Court’s Effective Reversal of its September 1 Hill Order Finding that Rule 43(k), SCRPC, was Applicable to any Documents Purporting to Resolve the Foreclosure Action.

In the September 1 Hill Order, the trial court ruled that Hill’s testimony regarding alleged settlement issues was not required, because Respondents had not moved to compel any settlement. (R. pp. 15-16.) In 2018, Respondents effectively converted their Motion to Dismiss the foreclosure compliant into a Motion to Compel Settlement, in the form of a Motion for Summary Judgment on Respondents’ affirmative defense of there being a settlement agreement requiring Appellant to dismiss its foreclosure complaint with prejudice in exchange for a Deed in Lieu. (R. pp. 40-48.)

The trial court erred by: (1) failing to consider the existing record from the testimony of Howard and Parker showing that there was no complete settlement agreement (discussed *supra*); (2) by refusing Hill’s request to address factual issues at the hearing, even though Rule 43(e), SCRPC, allows for oral testimony to address a motion based on evidence not in the record; and

(3) by striking the Hill Affidavit, which stated factual issues relating to the purported settlement, and repeated factual issues already addressed to the trial court. The trial court clearly erred by failing to provide Appellant any opportunity to supplement the record regarding the purported settlement to allow for an evidentiary determination on Respondents' claim that Respondents' actions were sufficient to compel settlement and dismissal of this action. Rule 43(k), SCRCF, provided the trial court an opportunity to exercise discretion as to whether to accept evidence through affidavit or live testimony, but the failure to consider either constituted a clear abuse of discretion. Rule 43(k), SCRCF.

At the July 17, 2018, hearing, after the trial court elected to address Respondents' Motion to Dismiss as a Motion for Summary Judgment, the trial court asked Appellant's counsel whether there was any evidence introduced regarding whether the delivery of the Deed in Lieu was subject to any conditions. (R. p. 653, lines 2-14.) The trial court did not afford Appellant any opportunity to supplement that record; however, near the conclusion of the hearing, Appellant's counsel requested leave for Hill to address issues related to the Deed in Lieu for Appellant. (R. p. 655, lines 23-24.) Respondent's counsel objected to the request, stating that Hill could not be a witness, based on an earlier trial court ruling. (R. p. 655, line 15-p. 656, line 17.) The trial court stated that it was not conducting an evidentiary hearing, and barred Hill from presenting testimony to the court. (R. p. 655, line 25-p. 656, line 17.) Under Rule 12(b), SCRCF, the trial court was required to give Respondent an opportunity to supplement the record once it elected to consider a Motion for Summary Judgment; however, the trial court failed to do so. Rule 12(b), SCRCF.

Prior to the trial court's entry of an Order Granting Respondents' Motion for Summary Judgment, on September 7, 2018, Hill filed the Hill Affidavit, which, in part, stated that Hill was unsuccessful in resolving subordinate liens on behalf of Appellant, and that Appellant therefore

never accepted the Deed in Lieu, which it held in trust pending resolution of subordinate liens. (R. p. 702-03, ¶ 8.) On September 27, 2018, the trial court entered an Order granting Respondents' Motion for Summary Judgment, and the Order does not include the Hill Affidavit as part of the record considered in its ruling. (R. p. 43.) In its October 8, 2018 Motion to Reconsider the Summary Judgment Order, Appellant argued that the trial court failed to consider the Hill Affidavit and other materials in the record. (R. pp. 222-26.) The trial court stated at the hearing on the Motion to Reconsider that it was denying the Motion to Reconsider because the trial court believed Appellant could not provide an accounting, and it refused to consider additional evidence. (R. p. 687, line 24-p. 688, line 11.) Further, the Court issued an Order on February 13, 2019, striking the Hill Affidavit. (R. p. 67.)

Respondents' objection to Hill's presentation of testimony at the hearing was based on the September 1 Hill Order, which found that Hill was not a witness to the underlying facts of the action, and that he was not required to be disqualified as counsel for Appellant. (R. p. 15.) The trial court afforded Appellant no opportunity to supplement the record when it reversed its prior evidentiary ruling, and such failure constitutes an abuse of discretion.

At the July 17, 2018 hearing, Respondents argued that Hill's handling of documents created a merger of title, rendering Rule 43(k), SCRPC, inapplicable to the facts of this case. (R. p. 687, line 24-p. 688, line 11.) This argument skipped a necessary step, because there must be some enforceable agreement to settle the pending Foreclosure Action in order for the delivery of the Deed in Lieu to trigger a merger of title ending the case. Rule 43(k), SCRPC. Even so, Respondents' argument required a reversal of the trial court's findings of fact and law in the September 1 Hill Order; however, Respondents sought no modification of that Order. In finding Rule 43(k), SCRPC, inapplicable to this action, the trial court implicitly reversed the September 1

Hill Order, without explicitly doing so. Appellant had conducted discovery for a year in this case based on that ruling, and it did not pursue evidence regarding any restriction on the Deed in Lieu, because the September 1 Hill Order made that issue unnecessary.

Because the Court reversed its finding on Rule 43(k), SCRCF, at the July 17, 2018 hearing, it was required to offer Appellant an opportunity to conduct discovery on the merger issue, and it was further required to allow Appellant an opportunity to conduct discovery and to submit evidence in opposition to Respondents' Motion for Summary Judgment, based on the trial court's changed legal ruling. "Summary judgment "is a drastic remedy[, which] . . . must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 111-12, 410 S.E.2d 537, 543 (1991). Affording this opportunity to Appellant in this case would include allowing it to submit testimony from Hill, if required or desired. The trial court refused to consider evidence from Hill, either orally at the hearing or in the form of the Hill Affidavit, in part because of the September 1 Hill Order. (R.. p. 664, line 15-p. 665, line 17; p. 67.) In sum, the September 1 Hill Order either applies or it does not. If the trial court elected to reverse it, it was required to give Appellant an opportunity to supplement the record in opposition to Respondents' Motion for Summary Judgment – including, but not limited to, submission of testimony from Hill.

In an effort to establish the intention of the parties as to the Settlement Agreement, Respondents cited multiple communications between Parker and Hill. (R. p. 167; pp. 208-10; pp. 211-13.) By so arguing, Respondents made Hill a necessary witness, and rendered it essential for the trial court to allow Hill to present testimony regarding his communications with Parker, and Hill's intentions as counsel for Appellant with regard to potential settlement of this action. Assuming, *arguendo*, that Hill's testimony regarding settlement communications with Parker was

inadmissible due to the September 1 Hill Order, Respondents opened the door to Hill's testimony by placing at issue the communications between Parker and Hill in their exhibits to support Respondents' Motion for Summary Judgment. "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *Bowman v. State*, 422 S.C. 19, 40, 809 S.E.2d 232, 243 (2018).

Appellant submitted the Hill Affidavit to the trial court prior to the court's ruling on the Motion to Dismiss, and the trial court did not rule that it had closed the evidence at any point in time. By the plain language of Rule 12(b) and (c), SCRC, the trial court was therefore required to afford Appellant the opportunity to submit evidence in opposition to the pending motion. Rule 12, SCRC. Because the trial court did not place a time limit on the submission of evidence, the Hill Affidavit was timely submitted, and it should have been considered by the trial court – pursuant to the rules and particularly because the trial court barred Hill from presenting evidence at the hearing in opposition to the Motion to Dismiss.

C. Hill's Testimony Did Not Have to be in the Form of Sworn Testimony or Affidavit Testimony to be Relevant to the Question of Settlement Issues.

Regardless of the title given to Appellant's Motion for Summary Judgment, it was, in reality, a motion to enforce a settlement agreement. Respondents argue that the provision of the Deed in Lieu to Hill, coupled with Appellant's operation of the car wash, constitutes a merger of title that ended the Foreclosure Action. (R. p. 166.) Respondents also concede that the intentions of the parties are to control when determining whether merger of title occurred. (R. p. 166, *citing McCraney v. Morris*, 170 S.C. 250, 170 S.E.2d 276 (1933).)

Evidence on that issue existed in the record and should have been considered by the trial court. This is because Hill, through Appellant's co-counsel and via his own signature, submitted

pleadings to the Court affirming the communications with Parker at issue in this case. The evidence did not need to be in the form of sworn testimony or affidavit testimony of Hill. This is because the relevant communications were verified through the Hill Affidavit, and because pursuant to Rule 11, SCRPC, Hill's communications should be received as the representations of an officer of the court related to his representation of a client in the court. Rule 11, SCRPC. To the extent the trial court determined that a verification was necessary to render the representations admissible, Hill filed such a verification, with explicit reference to the portions of the record being verified. (R. pp. 701-06.)

III. The Trial Court Erred By Violating Rule 56, SCRPC, By Converting Respondents' Motion To Dismiss To A Motion For Summary Judgment, Without Affording Appellant An Opportunity To Present Evidence In Opposition To That Motion.

A. Standard of Review

The decision to convert a Rule 12(b)(6) Motion to one for summary judgment is a discretionary decision, with the caveat that exercising the discretion to convert the motion requires compliance with the requirements of Rule 56, SCRPC. *See* Rule 12(b), SCRPC (stating that "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56"). In determining whether a trial court's decision to convert a motion to dismiss to one for summary judgment was proper, the appellate court applies an abuse of discretion standard. *Charleston County School District v. Harrell*, 393 S.C. 552, 559, 713 S.E.2d 604, 608 n.4 (2011). Rule 12(b), SCRPC, requires the trial court to grant parties a reasonable opportunity to present evidence made pertinent by the conversion. Rule 12, SCRPC. What constitutes a "reasonable opportunity" is a discretionary decision by the Court, but not providing the parties *any* opportunity to present evidence would constitute an abuse of discretion. *Harrell*, 393 S.C. at 559, 713 S.E.2d at 608 n.

4.) When a court has authority to exercise discretion, the “failure to exercise discretion is itself an abuse of discretion.” *Schmidt v. Courtney*, 357 S.C. 310, 321, 592 S.E.2d 326, 332 (Ct. App. 2003).

As to compliance with the requirements of Rule 56, SCRCPP, in reviewing a grant of summary judgment “an appellate court applies the same standard that governs the trial court under Rule 56, SCRCPP.” *Singleton v. Sherer*, 377 S.C. 185, 196, 659 S.E.2d 196, 202 (Ct. App. 2008). Compliance with the requirements of Rule 56, SCRCPP, is an issue of law, which should be reviewed *de novo*. *Id.* “Where [an] action presents a question of law, . . . [the Court of Appeals’] review is plenary and without deference to the trial court.” *Crossman Cmty. Of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 518, 769 S.E.2d 453, 459 (Ct. App. 2015).

B. Respondents’ Motion to Dismiss Appellant’s Foreclosure Complaint Under Rule 12(b)(6), SCRCPP, Patently Lacked Merit.

“A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCPP, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.” *Overcash v. S.C. Elec. And Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). “In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCPP, 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).

Appellant’s Amended Complaint is a routine foreclosure complaint with the Note and Mortgage attached. (R. p. 75-81.) Respondents’ Motion to Dismiss is based on affirmative defenses, which, by necessity, requires consideration of matters outside the pleadings. (R. pp. 162-213.) Accordingly, the affirmative defenses cannot provide an appropriate basis for a Rule

12(b)(6), SCRCPP, dismissal.

Respondents never filed a Motion for Summary Judgment prior to the July 17, 2018 hearing, in which the trial court granted summary judgment to Respondents. Had Respondents' Motion been heard as a Motion to Dismiss, the trial court would have been required to deny the Motion. Rule 12, SCRCPP.

C. By Treating Respondents' Motion to Dismiss as a Motion for Summary Judgment, the Trial Court was Required to Give Appellant a Reasonable Opportunity to Submit Evidence in Opposition to that Motion.

In addition to the fact that Respondents clearly failed to meet their burden for a Motion to Dismiss, the trial court improperly converted Respondents' Rule 12(b)(6) motion to dismiss into a motion for summary judgment, because the trial court failed to allow Appellant to submit evidence in opposition to that motion for summary judgment. As noted in the Statement of the Case, Respondents never filed a Motion for Summary Judgment; and their first reference to such a motion was made in their July 9, 2018 Memorandum of Law in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment, which was filed fewer than ten days prior to the hearing on the Motion to Dismiss. (R. p. 13.)

At no time before the July 17, 2018 hearing did the trial court give the parties any notice that it would consider matters outside the pleadings in connection with Respondents' Motion to Dismiss. The first such notice was at that hearing, when the trial court said "all right" in connection with Respondents' counsel's statement that Respondents were basing their argument on a Motion for Summary Judgment. (R. p. 645, lines 13-16.) There is no evidence that the trial court exercised any discretion in electing to convert the motion, and the failure to exercise discretion is an abuse of discretion. *Schmidt v. Courtney*, 357 S.C. 310, 321, 592 S.E.2d 326, 332 (Ct. App. 2003).

Additionally, the trial court first referred to its consideration of matters outside the Complaint in its preliminary summary of findings stated during that hearing, but then gave Appellant no opportunity to offer evidence in opposition to the Motion. (R. p. 658, lines 3-20.) In the trial court's order granting Respondents' Motion for Summary Judgment, the trial court cited matters outside the pleadings as the record it considered; and it further stated that Appellant – as the responding party – was required to come forward with specific facts showing there is a genuine issue of fact remaining for trial, even though the trial court never afforded Appellant any opportunity to present such facts. (R. p. 43.)

In Appellant's October 8, 2018, Motion to Reconsider the Court's order, Appellant notified the trial court of the requirement that it accept evidence in opposition to the converted motion. (R. p. 220-22.) Even in the trial court's Order denying Appellant's Motion to Reconsider, the trial court did not find that it gave Appellant notice of Respondents' summary judgment motion prior to the hearing. In that order, the trial court merely stated that Appellant "had reasonable notice that the motion would be converted when the brief in support of the motion was filed in accordance with the Scheduling Order and [Appellant] waived any objection to the time of the conversion when [Appellant failed to raise the objection prior to or at the hearing]." (R. p. 57.)

Rule 12(c), SCRCR, provides that, "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(c), SCCRP. In *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987), the Supreme Court of South Carolina first addressed the procedure for conversion of a Rule 12(b)(6), SCRCR, motion to dismiss to a Motion for Summary Judgment. There, the Court held that "a trial court may treat

a 12(b)(6) motion as a motion for summary judgment *if* the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure.” *Id.* at 699, 353 S.E.2d at 367 (emphasis in original). Ultimately, the decision of whether to convert a 12(b)(6) motion to dismiss into a summary judgment motion is one to be made by the trial court – not by the parties through the filing of a brief or a statement made in court, as suggested by the trial court in this instance. *Id.*

A trial court’s decision to convert a motion to dismiss to one for summary judgment is proper only if it complies with Rule 12(c), SCRPC, and the trial court’s decision in this case did not comply with those requirements. Rule 12(c), SCRPC, allows trial courts to convert motions to dismiss into motions for summary judgment, only where: (1) the movant complies with the notice provisions in Rule 56, SCRPC; and (2) the trial court affords the nonmovant a reasonable opportunity to respond to the motion in accordance with Rule 56(c) and (e), SCRPC. *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). When a trial court considers matters outside the pleadings in relation to a motion to dismiss before the nonmovant has had a reasonable opportunity to introduce evidentiary matters in response to the motion, the conversion is improper. *Harrell*, 393 S.C. at 559, 713 S.E.2d at 608 n.4 (2011).

In this case, the trial court gave Appellant no notice that it would consider matters outside the pleadings in relation to Respondents’ pending Motion to Dismiss prior to the July 17, 2018 hearing. It was only at the hearing that the trial court first stated that it would consider matters outside the pleadings. Further, the trial court did not afford Appellant any opportunity to supplement the record in opposition after the hearing. In addition, Respondents first raised the possibility of their moving for summary judgment when they filed their Brief in support of their Motion to Dismiss on July 9, 2018 – fewer than ten days prior to the hearing on said motion. Thus,

even had Respondents mentioning same in their brief somehow provided legal notice to Appellant of the trial court's decision to convert the Motion to Dismiss to one for summary judgment – which Appellant contends it did not – then the trial court still did not afford Appellant the required ten days to prepare for same.

The trial court's conversion of Respondents' Motion to Dismiss into one for summary judgment was improper, because the trial court was required to give Appellant an opportunity to supplement the record in opposition to the Motion for Summary Judgment, prior to ruling. This is made clear by our Supreme Court's decision in *Harrell*, in which it held that a trial court failed to provide a school district a reasonable opportunity to present outside materials in opposition to several political figures' summary judgment motion because the trial court ruled on the motion without allowing the school district to submit any evidence to defend against the motion. *Harrell*, 339 S.C. at 559, 713 S.E.2d at 608 n.4. The Court reasoned the trial court provided the school district with no opportunity to introduce any evidence in opposition to the motion. *Id.*

To the extent Respondents argue that there was some sort of implicit conversion based on their filing of matters outside the pleadings in support of their Motion to Dismiss, such implicit conversion was untimely. By comparison, in *Pitts v. Jackson National Insurance Company*, 352 S.C. 319, 573 S.E.2d 502 (Ct. App. 2002), the Court of Appeals held a trial court provided a plaintiff a reasonable opportunity to present outside materials in opposition to an insurance company's converted motion for summary judgment, because the court ruled on the motion six months after the person received notice that a motion to dismiss might be converted into a motion for summary judgment. In this case, Respondent's brief mentioning a possible summary judgment motion was filed fewer than ten days prior to the hearing date; so, any materials associated with that brief and possible motion would have been untimely if filed in support of an actual Motion

for Summary Judgment.

The proper procedure the trial court should have followed in electing to convert the Respondents' Motion to Dismiss into a Motion for Summary Judgment would have been the procedure utilized in *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 593 S.E.2d 624 (Ct. App. 2004). There, the plaintiff received affidavits in support of a Motion to Dismiss two months prior to the hearing date, and the trial court considered the supporting affidavit only after the plaintiff filed an affidavit in opposition to the Motion. *Id.* at 574-75, 593 S.E.2d at 627. Here, the trial court afforded Appellant no such opportunity, and the trial court's ruling should be reversed, in accordance with *Harrell*. See *Harrell*, 393 S.C. at 559, 713 S.E.2d at 608.

IV. The Trial Court Erred By Granting Respondents' Motion For Summary Judgment, Because There Was A Genuine Issue Of Material Fact In This Action.

A. Standard of Review

"In reviewing the grant of a summary judgment motion, [an appellate court] applies the same standard as the trial court under Rule 56(c), SCRPC." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438-39 (2003). Such a motion should only be granted . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC.

B. The Record Before the Trial Court Demonstrates That There is a Genuine Issue of Material Fact.

As noted above, Hill should have been allowed to provide testimony regarding the Deed in Lieu and a proposed settlement agreement. The Hill Affidavit shows that Hill engaged in settlement negotiations in an effort to resolve the action, whereby there was an agreement for

Respondents to execute a Deed in Lieu, to be held in trust while Appellant tried to negotiate lien releases with subordinate lienholders. (R. pp. 702-03, ¶ 8.) Further, the Hill Affidavit states that Appellant never accepted or recorded the Deed in Lieu, leaving title vested in CPH. (R. pp. 702-03, ¶¶ 8.) Hill further testified that Appellant was never able to obtain lien releases from junior lienholders. (R. pp. 702-03, ¶ 8.) The evidence in the record precluded the entry of summary judgment because the Hill Affidavit and the testimony of Parker created a genuine issue as to whether the delivery of the Deed in Lieu to Hill was effective to convey title to Appellant as part of an agreement to dismiss the Foreclosure Action.

Additionally, the case record at the time of the hearing included the deposition testimony of Howard, who is a member and manager of Appellant. (R. p. 43; pp. 289-409.) Howard testified that when he purchased the BB&T note for \$200,000, he believed the Property to be worth \$200,000. (R. p. 310, lines 5-14.) Howard further testified that he had never heard of a deed in lieu of foreclosure related to the Property, and that the purpose of buying the BB&T note was to obtain a clear deed to the Property. (R. p. 311, lines 9-17.) It is impossible to believe that Howard would have taken title to the Property subject to the subordinate liens, because he gave direct testimony that he would not have done so – he wanted “clear” title. (R. p. 311, lines 9-17.)

Additionally, Parker’s testimony demonstrates that there is an issue of material fact as to whether delivery of the Deed in Lieu, with no other documents, was sufficient to settle the pending Foreclosure Action. Parker admitted in his deposition that neither Parker nor CPH obtained a signature of Howard or Hill on the Deed in Lieu, and he further admitted that the Deed in Lieu does not reference the SBA loan. (R. p. 508, line 25-p. 509, line 19.) Additionally, Parker cannot state whether he signed an affidavit in connection with the Deed in Lieu, which referenced other liens on the Property, and he cannot say whether he signed any other affidavits regarding the value

of the Property (and if he did, he does not have that document). (R. p. 509, line 23-p. 511, line 6.) Although CPH was a single asset entity, Parker cannot say whether he obtained a certificate of compliance from the South Carolina Department of Revenue for the purported transfer of the Property, and there was no LLC resolution prepared which would authorize Parker to convey the Property. (R. p. 511, line 17-p. 512, line 5.)

South Carolina law clearly allows a mortgagor to enter a premises without a merger of title:

It is well established, [in South Carolina], that where a mortgagee enters with the permission, either express or implied, of the mortgagor, he occupies the premises in the quasi character of trustee for the mortgagor and cannot hold adversely to the rights of the mortgagor until he distinctly disavows and repudiates his mortgagee relationship and notice thereof is brought home to the mortgagor.

May v. Jeter, 245 S.C. 529, 536, 141 S.E.2d 655, 658 (1965). This rule requires a factual examination of the facts, as Respondents provided no proof of their ouster from the Property. *Id.* Parker gave Appellant access to the Property by providing a key to the car wash on it, but there is no evidence that Appellant then excluded CPH from accessing the Property. (R. p. 585, lines 8-21.) Accordingly, there are sufficient issues of material fact that rendered it error for the trial court to grant Respondents' Motion for Summary Judgment.

Further, Appellant could obtain legal title to the Property (in addition to possession) only if it accepted the Deed in Lieu. Respondents apparently contend there is a presumption of acceptance of the deed, but such presumption exists only if the voluntary conveyance of a deed is beneficial to the recipient. *Branton v. Martin*, 243 S.C. 90, 100, 132 S.E.2d 285, 290 (1963). Here, Howard testified that he wanted only a clear title to the Property; so, the Deed in Lieu was beneficial only if the subordinate liens were resolved. (R. p. 311, lines 9-17.) Further, Appellant's counsel pointed out to the trial court at the July 17, 2018 hearing that the delivery of the Deed in Lieu was conditional, based on the potential resolution of SBA lien, as indicated by Parker's email

to Hill that the SBA loan could be resolved by payment of \$2,000. (R. p. 649, line 4-p. 650, line 22.)

Finally, in *McCraney v. Morris*, 170 S.C. 250, 279, 170 S.E. 276, 279 (1933), the rule is set that “in equity at least merger will not take place if opposed to the intention of the parties, affirmatively proved, or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests became united.” Appellant has created, through the Howard testimony and other evidence presented, at least an issue of fact as to whether merger would be in Appellant’s interest. Accordingly, the trial court’s grant of summary judgment on this issue is in error.

The evidence that was in the record, and which should have been in the record, clearly creates at least an issue of fact that Appellant did not intend to accept the Deed in Lieu, unless or until subordinate liens were resolved. This is further demonstrated by the fact that Appellant never recorded the Deed in Lieu, while pursuing the foreclosure, as well as the fact that Appellant never dismissed the foreclosure action. (R. p. 704, ¶¶ 16, 17.) Accordingly, there existed at the time of the hearing on the Motion for Summary Judgment an issue of fact as to whether the parties entered an enforceable settlement agreement, which led to a merger, which renders the grant of summary judgment in error.

At the very least, the disagreements in the testimony of Parker, Howard, and Hill show that there was no meeting of the minds between Appellant and Respondents as to the terms by which this Action would be settled. Accordingly, the grant of summary judgment was inappropriate.

It is undisputed that Respondents have produced no documents which comply with the requirements of Rule 43(k), SCRPC. (R. p. 638, line 14 – p. 643, line 5). But, even if Rule 43(k), SCRPC, does not apply – which Appellant does not concede – then trial court erred in granting

Respondents' Motion for Summary Judgment in this Action. This is because such a ruling required a finding that, when the evidence is considered in the light most favorable to Appellant, there were no facts supporting Appellant's denial of a settlement agreement. *See* Rule 56, SCRCP.

C. The Trial Court Improperly Considered Evidence Outside the Record in Granting Summary Judgment and in Denying the Motion to Reconsider.

At the hearing on the Motion to Reconsider the Order Granting Summary Judgment, the trial court stated:

When we were here during the summary judgment part the intention of my order and still is to do equity regarding this whole entire situation. I took into consideration the length of time that Super Suds, the now Plaintiff, operated the car wash and that the signage was changed, all those matters. And during either a conference or a hearing when the question came up as to the ability of Super Suds to create an accounting, counsel, Mr. LeGrand said that he is not able because – not able to create an accounting on this property because of the commingling of the funds from this particular location and his other remaining locations. Having heard all of that and considered all of that it was an equitable decision that what needed to be done should be done.

(R. p. 687, line 24-p. 688, p. 7.)

As a preliminary matter, this statement indicates that the court is weighing evidence, which is inappropriate at the summary judgment stage of trial. Rule 56, SCRCP. If there is any evidence or a deduction therefrom that Appellant did not intend to merge title, then the trial court is required, under Rule 56, SCRCP, to deny Respondents' Motion for Summary Judgment. *Id.* Further, the trial court's statement that its ruling is based on a statement of counsel, potentially made at a status conference, demonstrates that the trial court considered information not properly in the record in ruling on the Motion for Summary Judgment, while simultaneously denying Appellant permission to supplement the record as required by Rule 12(c), SCRCP. Rule 12(c), SCRCP. Both decisions are errors, which require reversal of the trial court's orders.

V. The Trial Court Erred By Granting Respondents Equitable Relief In This Case, When It Is Undisputed That CPH Engaged In The Unauthorized Practice Of Law.

A. Standard of Review

As noted above, the standard of review for an appeal from a grant of summary judgment is a *de novo* review by the appellate court to determine whether there is a genuine issue of material fact and whether the moving party was entitled to judgment as a matter of law on the claims submitted for summary judgment. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 73, 698 S.E.2d 244, 247 (Ct. App. 2010).

B. In Granting Respondents Equitable Relief, the Trial Court Ignored Record Evidence of Respondents' Unclean Hands, Which Evidence was Directly Identified in Appellant's Motions to Reconsider.

In the January 17, 2019 hearing, the trial court stated that a reason it granted Respondents' Motion for Summary Judgment was to do equity in the case. (R. p. 687, line 24-p. 688, line 7.) When the trial court made that statement, and when the trial court conducted initial hearing on the Motion for Summary Judgment, and when the trial court ruled on Appellant's Motions to Reconsider, there was undisputed evidence in the record that CPH, a South Carolina LLC, was represented by Parker, a non-lawyer, both when it filed an Answer in the Court of Common Pleas, and when it executed the Deed in Lieu, in purported resolution of this action. (R. p. 74; p. 639, line 16-p. 641, line 11; pp. 34, 38; pp. 218.)

In *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), the Court of Appeals held that a party that engaged in the unauthorized practice of law related to the transaction at issue in the case is barred from seeking equitable relief, due to application of the doctrine of unclean hands. *Id.* at 74, 698 S.E.2d at 247. In *Coffey*, the lender was barred from

foreclosing a mortgage because the mortgage paperwork was prepared by non-lawyers, in violation of the South Carolina rules governing the practice of law. *Id.* The Court of Appeals noted that the “unauthorized practice of law is inherently prejudicial not only to the parties involved in the . . . transaction but also to the public at large . . . ,” and further stated:

The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for 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. at 76, 698 S.E.2d at 248.

In the present case, a non-lawyer represented CPH by filing pleadings on its behalf in the Court of Common Pleas for Spartanburg County, and in negotiating and purportedly participating in the preparation of settlement documents for CPH, during the pendency of this action. (R. p. 505, lines 10-15; p. 583, line 19-p. 584, line 5; p. 506, lines 4-6; pp. 126-31.) CPH then asserted its representation as a non-lawyer as a basis for preventing application of Rule 43(k), SCRCPC, to the purported settlement of the case through the Deed in Lieu, and the trial determined Rule 43(k), SCRCPC, was inapplicable to the Deed in Lieu, based on CPH’s failure to be represented by an attorney licensed to practice in South Carolina during the pendency of this action. (R. p. 639, line 18-p. 640, line 18; p. 38.) The trial court provided Respondents an equitable remedy, even though Respondents had unclean hands, by their own admission.

Additionally, prior to the trial court’s statements on the record about its intent to provide an equitable result, Appellant notified the trial court that it had improperly provided an equitable remedy to Respondents, based on CPH’s unclean hands and its failure to comply with court rules regarding representation of LLCs by non-lawyers. (R. p. 218.) Despite having this knowledge of the improper representation of CPH by a non-lawyer, the trial court denied Appellant’s motion for

a declaration under Rule 43(k), SCRC, and granted summary judgment to CPH, based on equitable considerations. (R. p. 687, line 24-p. 688, line 7.)

Corporations and limited liability companies are allowed to be represented by a non-lawyer at the magistrate's court level only, and non-lawyers are allowed to perform such representation only when they are designated in a written document filed with the magistrate's court at the time of the filing of an initial pleading in a case. S.C. Code Ann. § 33-1-103. It is clear that a non-lawyer is not allowed to represent a corporation in circuit court. *Renaissance Enters., Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 515 S.E.2d 257 (1999). This rule extends to limited liability companies, as demonstrated by S.C. Code Ann. § 33-1-103, which includes limited liability companies within the definition of "corporation" for purposes of evaluating which entities must designate an employee or principal to represent that entity's interests in magistrate's court. S.C. Code Ann. § 33-1-103.

Further, beyond litigation, the Supreme Court of South Carolina has noted that the practice of law "extends to activities in other fields which entails specialized legal knowledge and ability." *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 487, 560 S.E.2d 612, 617 (2002). In *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987), the Supreme Court held that non-lawyers are not allowed to prepare deeds, mortgages, note or other legal instruments related to mortgage loans or transfers of real property. *Id.* at 432, 357 S.E.2d at 18. Such restriction should also extend to negotiation of instruments on behalf of limited liability companies resolving disputes related to notes and deeds.

All of CPH's equitable defenses and counterclaims based on the Deed in Lieu are barred, because of clear "South Carolina precedent asserting that no person be permitted to acquire a right of action [or affirmative defense] from their own unlawful act and that one who participates in an

unlawful act cannot recover damages for the consequences of that act.” *Coffey*, 389 S.C. at 76, 698 S.E.2d at 246. Further, all legal defenses connected to the unauthorized practice of law are also barred, because “this rule [barring benefits arising from an unlawful act] applies at both law and equity and whether the cause of action is in contract or tort.” *Id.* The bar on equitable and legal defenses and counterclaims related to the unauthorized practice of law extends to Parker as well, because Parker is the individual who engaged in the unauthorized practice of law in his representation of CPH, and Parker cannot be allowed to benefit from that unauthorized practice.

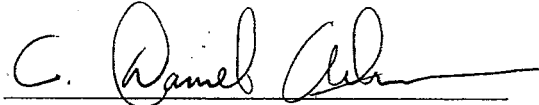
CONCLUSION

Appellant and Hill never agreed for Appellant to accept the Deed in Lieu to the Property subject to subordinate liens. Such action would be illogical, and the record is clear that Howard, the member-manager of Appellant, sought clear title to the Property. Accordingly, Respondents’ settlement agreement contentions are illogical and wrong.

Rule 43(k), SCRPC, controls any purported settlement agreement in this case. Respondents concede they have no agreement which complies with Rule 43(k), SCRPC; therefore, this Action must be remanded to the trial court for a finding that there is no Rule 43(k)-compliant agreement. Any other finding will create a disaster for handling of future disputes over settlement agreements.

Even if Rule 43(k), SCRPC, does not apply, there has been no meeting of the minds on a potential settlement agreement; therefore, there is no binding settlement agreement. Certainly, there is at least an issue of material fact as to whether a settlement agreement was formed and what its terms provide. The matter must be remanded on that basis, and also because the trial court failed to afford Appellant a full opportunity to introduce evidence on the issue of the settlement agreement. Finally, the trial court improperly granted Respondents an equitable remedy, when the

evidence is undisputed that CPH had unclean hands as a result of the unauthorized practice of law. Accordingly, the matter should be remanded to the trial court, for findings consistent with the evidence.



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December 18, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-In-Equity
Trial Court Case No. 2011-CP-42-0500

Appellate Case No. 2019-000404

RECEIVED
DEC 23 2019
SC Court of Appeals

Super Suds, LLC, Appellant,

v.

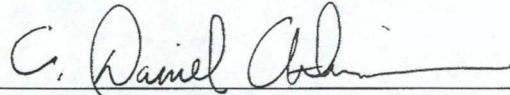
Carolina Properties Holdings, LLC, Walter W. Parker, IV, the United States of America by
and through the U.S. Small Business Administration, Carolina Clean Greer I, LLC, and
Community Development & Improvement Corporation, Defendants,

Of Which Carolina Properties Holdings, LLC, and Walter W. Parker, IV are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing *Final Brief of Appellant* complies
with Rule 211(b), South Carolina Appellate Court Rules.

December 18, 2019

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