THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Appellate Case No. 2018-000436

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,.....Respondent/Appellant,

v.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of whom Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey are the.....Appellants/Respondents.

APPELLANTS/RESPONDENTS' FINAL REPLY BRIEF

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STATEMENT OF ISSUES

I. **Where the lower court ruled that Respondent/Appellant mortgagee violated S.C. Code Ann. § 29-3-320, which mandates monetary relief for its violation, did the lower court err in allowing Respondent/Appellant an opportunity to escape monetary liability for violating the statute?**

ARGUMENT

I. Deutsche Bank is improperly trying to use its respondent's brief in Bailey and Owens' appeal as a supplement to its appellant's brief in its own appeal.

Respondent/Appellant (hereinafter "Deutsche Bank")'s respondent's brief in this cross-appeal "incorporates by reference the arguments made in its Appellant's Initial Brief[.]" (Final Respondent's Brief of Respondent/Appellant p. 13 n. 6.) Deutsche Bank then states that "[t]hose arguments are nevertheless summarized herein for the Court's assistance and reference." (Final Respondent's Brief of Respondent/Appellant p. 13 n. 6.)

Poppycock. Deutsche Bank's respondent's brief does not "summarize[]" the arguments in its appellant's brief; it presents completely new – and unpreserved – arguments in favor of its own appeal. Deutsche Bank's appellant's brief spends a mere two pages setting out its argument about why it thinks the master-in-equity erred in granting the Appellants/Respondents (hereinafter "Bailey and Owens") summary judgment on liability under S.C. Code Ann. § 29-3-320. (Final Appellant's Brief of Respondent/Appellant pp. 26-27.) In its respondent's brief, ostensibly a response to Bailey and Owens' appellant's brief, Deutsche Bank sets out almost four pages of argument about that and expressly advocates for reversal of a ruling subject of *its own* appeal. (Final Respondent's Brief of Respondent/Appellant pp. 16-20.) That Deutsche Bank is using its respondent's brief as a second appellant's brief could scarcely be more blatant. In what is supposed to be a brief about why the master did not err by varying Bailey and Owens' relief under S.C. Code Ann. § 29-3-320, Deutsche Bank comes right out and says that "[f]or this additional reason, the Court should reverse the trial

court, grant summary judgment to Deutsche Bank on Bailey and Owens' counterclaim pursuant to § 29-3-310[.]" (Final Respondent's Brief of Respondent/Appellant p. 20.)

All of an appellant's arguments in favor of reversal must be included in his initial appellant's brief. State v. Wakefield, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996); see Platt v. CSX Transp., Inc., 388 S.C. 441, 697 S.E.2d 575, 578 (2010) (argument not preserved where not fully asserted until reply brief before Court of Appeals). Accordingly, it is well settled that appellants are not allowed to use their reply briefs to make new arguments in support of reversal. Platt, 697 S.E.2d at 578; Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999); Wakefield, 323 S.C. at 191; Fields v. Melrose Ltd. Pshp., 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993). For the same reason, Deutsche Bank is not permitted to use its respondent's brief in this cross-appeal as a second appellant's brief to advance its new arguments for the reversal it seeks. See id.

Further, the argument it sets out in its respondent's brief in support the reversal it wants – chiefly, an argument about the meaning of the word *received* under S.C. Code Ann. §§ 29-3-310 and -320 – was not made in its appellant's brief nor ever once made in the proceedings below. (Final Appellant's Brief of Respondent/Appellant); (R. pp. 173-218, 165-69, 266-83, 345-63.) It is not preserved for review. To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011); Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). Deutsche Bank never made its new argument until now. It was not included in its appellant's brief

because Deutsche Bank knows this argument is not preserved for review. (Final Appellant's Brief of Respondent/Appellant.)

Deutsche Bank is hoping it can slip this by the panel and have this court see this as an additional sustaining ground argument, even though that is not what it is. Deutsche Bank does not do much to hide that it is making an outright argument for reversal, stating that this court "should reverse the trial court" on this unpreserved argument. (Final Respondent's Brief of Respondent/Appellant p. 20.)

Deutsche Bank does not get to do that. It has its appeal, in which it has submitted an appellant's brief. It did not include these new arguments in that brief. It would not have been proper to include them in that brief anyway. Deutsche Bank has overstepped its bounds and used its respondent's brief for an improper purpose.

II. Bailey and Owens' invited response to Deutsche Bank's improper attempt to supplement its appellant's brief in its own appeal: Deutsche Bank's argument about the word *received* is easily dismantled.

When a party makes improper argument, the opposing party is permitted to make "an appropriate response" to them, even if the response would otherwise be impermissible. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72 (2004); accord Bowman v. State, 809 S.E.2d 232, 243-44 (S.C. 2018) (same); Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224, 226 (2006) (same); Holston v. Jackson, 278 S.C. 137, 139, 292 S.E.2d 794, 795 (1982) (applying the principle). This is what is referred to as "opening the door" or the "invited response" or "invited reply" doctrine. Bowman, 809 S.E.2d at 243; Vaughn, 362 S.C. at 169.

The court should not consider the arguments in Deutsche Bank's respondent's brief that it makes in favor of reversal because they are unpreserved and were not

argued in Deutsche Bank's appellant's brief. If the court does end up considering them, however, Bailey and Owens, by way of an invited response, incorporate and point the court to their respondent's brief in Deutsche Bank's appeal and also offer a rejoinder to Deutsche Bank's argument about the word *received* under S.C. Code Ann. §§ 29-3-310 and -320.

Receive is defined as follows:

> **1** to take or get (something given, thrown, sent, etc.) **2** to experience, undergo [to *receive* acclaim] **3** to bear or hold **4** to react to in a specified way **5** to learn [to *receive* news] **6** to let enter **7** to greet (visitors, etc.)

Webster's New World Dictionary and Thesaurus 515 (New York 1996).

Nothing in S.C. Code Ann. §§ 29-3-310 or -320 indicates that satisfaction has to be received in any particular way. Nothing indicates that such reception has to be of a physical object. Nothing indicates that such reception has to be of money. Deutsche Bank *got* final judgment in Bailey v. Novastar – which is what the master determined was the event of satisfaction. (R. pp. 23, 27, 33.) Deutsche Bank *experienced* and *underwent* final judgment in Bailey v. Novastar. Deutsche Bank received final judgment in Bailey v. Novastar. Deutsche Bank might not have gotten a check, but it received satisfaction of its mortgage.

III. Deutsche Bank advances illogical argument about when satisfaction occurred.

Deutsche Bank contends that satisfaction of its mortgage did not happen when final judgment was rendered in Bailey v. Novastar but, instead, would have only happened once Judge Spence later *ruled* that the final judgment in Bailey v. Novastar had satisfied the mortgage by operation of law. Responding to Bailey and Owens'

negligence case analogy, Deutsche Bank contends that, "of course, a person is not negligent under the law until a court of competent jurisdiction so determines." (Final Respondent's Brief of Respondent/Appellant p. 21-22.)

Seriously? Is Deutsche Bank seriously contending that the defendant in a negligence wreck case was not negligent at the point that he failed to exercise due care, crossed the center line, and collided with the plaintiff? Is Deutsche Bank seriously contending that the moment of the occurrence of that defendant's negligence would be when the jury returns a verdict against him? That is not just illogical; it is downright ludicrous. If a person unlawfully breaks into a house, does he only become a burglar once he is found guilty of burglary? Does the burglary occur at the time of conviction?

Deutsche Bank's argument about when satisfaction occurred is just as illogical. The master's order in this case is not what satisfied the mortgage. The master's order simply determined that the effect of an earlier event – the rendering of final judgment in Bailey v. Novastar – was to satisfy the mortgage. (R. pp. 1-41.) That is the only logical way to read it. The event of satisfaction had happened before the other events that triggered liability under S.C. Code Ann. § 29-3-320, as S.C. Code Ann. §§ 29-3-310 and -320 require.

IV. Deutsche Bank's argument ignores the way the master actually ruled.

Deutsche Bank writes that "the trial court correctly found that the Mortgage was not satisfied unless and until the trial court decided to apply the doctrine of res judicata to bar Deutsche Bank from foreclosing on the Note and Mortgage." (Final Respondent's Brief of Respondent/Appellant p. 20.) That is not correct. That is not what the master found. The master found as follows:

> The court concludes that *satisfaction*, within the meaning of S.C. Code Ann. § 29-3-310 and -320, embraces the discharge of the mortgage by operation of law, which extinguishes the mortgage. That is what has happened here, as the undisputed facts show. Bailey and Owens are entitled to summary judgment in their favor as to Deutsche Bank's liability to them under S.C. Code Ann. § 29-3-320.

(R. pp. 33-34.)

Nor did the master change that determination when he ruled on Bailey and Owens' motion to reconsider his decision to vary the relief available under S.C. Code Ann. § 29-3-320. In his order ruling on that motion, the master stated the following:

> While the Court found that the mortgage *had been satisfied*, it noted that satisfaction had not occurred in the usual manner, and held that the question of whether the mortgage was satisfied remained open until the enforceability of the mortgage had been judicially determined.

(R. p. 46) (emphasis added).

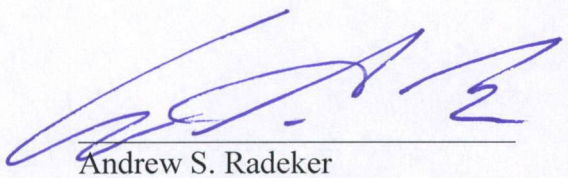
That is not a ruling that satisfaction did not occur until the master issued his order granting summary judgment to Bailey and Owens. The master noted that "the question of whether the mortgage was satisfied remained open" until that question was later decided; he did not rule that satisfaction did not occur until that question was decided. (R. p. 46.) In the example given in the section of this reply brief directly above, the question of whether the defendant driver's actions and omission constituted negligence remained open until the jury returned a verdict for the plaintiff, but that does not mean the negligence occurred when the verdict was read. The question of whether the burglary defendant's actions constituted burglary remained an open one until he

was convicted of burglary, but that does not mean that he did not commit burglary until the moment of his conviction.

CONCLUSION

Deutsche Bank offers no argument at all to the effect that the lower court had any authority to vary the statutory remedy under S.C. Code Ann. § 29-3-320. This court should reverse the master on this point and remand for a hearing be set to determine the amount of the monetary relief to which Bailey and Owens are entitled under S.C. Code Ann. § 29-3-320. The master's detailed and thoroughly analyzed order should remain the same in its other respects.

Respectfully submitted,



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November 26, 2018

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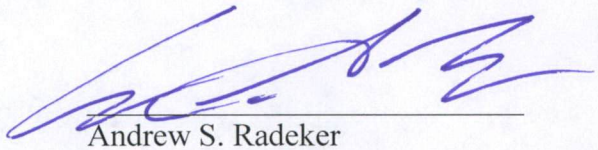
CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

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

Respectfully submitted,



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PROOF OF SERVICE OF FINAL BRIEFS

I certify that I served the Appellants/Respondents' final briefs by depositing a copy of each of them, along with a bound copy of the record on appeal, on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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