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**Apr 26 2022**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

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Shannon M. Phillips, Master-in-Equity

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Common Pleas Case No. 2019-CP-42-02270

Appellate Case No. 2022-000393

U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation  
Trust, ..... Respondent,

v.

Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery,  
individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie  
Davis Lowery, Deceased; South Carolina Department of Revenue; The United States  
of America acting by and through its agency, Department of the Treasury - Internal  
Revenue Service; and Elizabeth A. Lowery, ..... Defendants,

Of whom Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a  
Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery  
a/k/a Lisa Marie Davis Lowery, Deceased, is  
the ..... Appellant.

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**RESPONDENT’S MOTION  
TO DISMISS APPEAL**

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The Respondent, U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust  
 (“US Bank” or “Respondent”) hereby moves this court for an order dismissing this appeal on the  
 grounds that the order appealed is interlocutory with a final decree contemplated by the court  
 after a final foreclosure hearing. The grounds for this motion are set forth in more detail below:

## **FACTUAL/PROCEDURAL BACKGROUND**

The parties previously filed cross motions for summary judgment in this case which resulted in two orders by the Honorable Gordon G. Cooper filed May 10, 2021 (Denying Defendant's motions for summary judgment on counterclaims and Plaintiff's claim) and May 20, 2021 (Granting Plaintiff's partial motion for summary judgment as to offensive use of the claim of unconscionability and limited use to an affirmative defense and setoff). These orders recite the background facts of this case and are incorporated by reference.

Subsequent to these orders, the matters remaining for the court were Defendant's affirmative defenses of unconscionability, res judicata and release, the Plaintiff's foreclosure and Defendant's counterclaim based on the alleged violation of the attorney preference statute.

Respondent U.S. Bank filed a motion for summary judgment to dispose of these final issues which was heard by the Master-in-Equity Judge Shannon Phillips on January 31, 2022. As a result of this hearing, Judge Phillips issued an order which granted U.S. Bank summary judgment as to Defendant's affirmative defenses of unconscionability, res judicata and release. The court also granted summary judgment as to liability for foreclosure and for an attorney preference violation, but expressly left open for determination at a final hearing the amount of the debt and the amount of the set-off for the attorney preference violation. From the order:

The court agrees with Defendant that additional information needs to be provided to determine the amount of the debt; accordingly, Plaintiff is granted summary judgment as to liability for foreclosure, but Plaintiff must file and serve affidavits regarding the amounts at issue at least three days prior to a final hearing. (Order Granting partial summary judgment, pp. 10-11)

...

This court concludes that there is sufficient evidence to support a violation of the attorney's preference statute; however, as indicated in the previous discussion the court does not find that it rises to the level of unconscionability. Lowery may submit by affidavit the amounts for which he contends is entitled by way of set-off or recoupment at least three days prior to a final hearing.

Thus, is apparent from the express terms of the order a final hearing is contemplated by the court to complete this case with a final order.

### **DISCUSSION/ANALYSIS**

As a general rule, only final judgments are appealable. *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final. *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993). See also *Good v. Hartford Acc. & Indem. Co.*, 201 S.C.32, 21 S.E.2d 209 (1942) ("a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term . . ."). If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment. *Good v. Hartford Accident and Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942).

S.C. Code Ann. §14-3-330 sets forth the jurisdiction of the appellate courts. Subsection 1 concerns intermediate orders "involving the merits" and Subsection 2 concerns "An order affecting a substantial right made in an action when such order "(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." Because Lowery can still appeal the granting of partial summary judgment as to his affirmative defenses after a final decree<sup>1</sup>, then the only applicable appellate provision is S.C. Code Ann. §14-3-330(1) in cases "involving the merits." Respondent concedes that orders

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<sup>1</sup>*Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (S.C. 1990) ("Link was entitled here, under § 14-3-330(1), to wait until final judgment to appeal the summary judgment ruling against him.")

granting partial summary judgment *may* be immediately appealable as "involving the merits". *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) (an order "involves the merits" when it finally determines "some substantial matter forming the whole or a part of some cause of action or defense ...") However this permissive right must be contrasted with the strong public policy against piecemeal review and the narrow construction of exceptions to the final judgment rule.

The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment. In light of the policy underpinnings of the final judgment rule, exceptions should be recognized cautiously. *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (S.C. App. 2004). Generally, *section 14-3-330(2)*<sup>2</sup> has "been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). We believe a narrow construction of *section 14-3-330(2)(c)* requires us to focus on the effect of the order, not the label given to the motion or to the order granting it. To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly, eyeing the nature and effect of the order, not merely its label. *Tillman v. Tillman*, 801 S.E.2d 757, 420 S.C. 246 (S.C. App. 2017)

In this case, the nature and effect of the order was to simplify the issues to be determined at a final foreclosure hearing which was ready to be scheduled in short order. Thereafter, the Appellant Lowery is still able to appeal the final foreclosure decree in addition to the summary judgment as to his defenses. This would avoid piecemeal review and subsequent appeals concerning the same basic facts and issues. The court found in its order and Lowery admits that he has not paid installments under the mortgage since April 30, 2004. An appeal would further

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<sup>2</sup> While this refers to the other subsection of 14-3-330, Respondent believes the argument would apply to both sections.

delay this case by as much as two more years, and if Lowery were allowed (in effect) to appeal twice after the final decree, possibly four more years. This is not how the appellate system is supposed to work. The court's order expressly provided for more information to be provided in a final hearing. This court should dismiss this appeal without prejudice pending the final hearing on the merits.

Respectfully submitted,

**TOBIAS G. WARD, JR., PA**

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April 26, 2022

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served the foregoing Motion to Dismiss Appeal by emailing a copy of the same on April 26, 2022 to Appellant's counsel of record, Drew Radeker, Esq at the following AIS email address, by copy of the email filing with the S.C. Court of Appeals.

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Tobias G. Ward, Jr. PA

s/ Derrick Jackson  
J. Derrick Jackson, SC Bar 15192  
Attorney for Respondent US Bank