

**RECEIVED**  
**Jun 03 2022**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Jeannette W. McBride, Clerk of Court

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Case No. 2019-CP-40-4738

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U.S. National Bank  
Association, as Trustee  
Successor in Interest to  
Wachovia Bank, National  
Association f/k/a First Union  
National Bank, as Trustee for  
Long Beach Mortgage Loan  
Trust 2001-4,

Respondent,

v.

Michael R. Capers, Sheron K.  
Capers, South Carolina  
Department of Revenue,  
County of Richland, and  
Rolling Creek Community  
Homeowners Association,  
Inc.,

Of who, Michael Capers and  
Sheron Capers are the

Appellants.

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Motion to Reinstate with Memorandum

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Pursuant to Rule 240, SCACR, Appellants Move to Reinstate their Appeal. This Appeal was dismissed by an action of the court without motion from the parties on May 19, 2022. The reason given for the *sua sponte* dismissal is, “Because the underlying order is not immediately appealable, this appeal is dismissed. *See N. Carolina Fed. Sav. & Loan Ass’n v. Twin States Dev. Corp.*, 289 S.C. 480, 481, 347 S.E.2d 97, 97

(1986)(holding an order of reference in an action to foreclose a mortgage is not subject to an immediate appeal).”

The Circuit Court case giving rise to this appeal was brought by the respondent with to foreclose on a mortgage. A Copy of the Complaint without exhibits is attached as Exhibit “1.” However, Appellants filed an Answer and Counterclaim to the Complaint asserting various compulsory counterclaims and their right to a jury trial. A Copy of the Answer and Counterclaims is attached as Exhibit “2.”

Appellants filed their Notice of Appeal in this matter on the grounds that the Order for Reference to Master in Equity signed and issued by the Clerk of Court denies the Appellants their right to a jury trial on their compulsory counterclaims.

In this case, the Appellants assert their right to a jury trial with the Answer and Counterclaims so the transfer to the Master in Equity of the entire action deprives them of the right to a mode of trial to which they are entitled. Orders affecting the mode of trial affect substantial rights and must be appealed immediately. Lester v. Dawson, 491 S.C. 240, 266, 491 S.E.2d 240. If the Appellants did not appeal this order now and later tried to re-assert their right to a jury trial, they would be found to have waived it.

When a case involves legal and equitable issues, there exists a right to a jury trial on the legal issues. *see* Time Warner Cable v. Condo Services, Inc 381 S.C. 275, 672 S.E.2d 816 (2009); *see* Johnson v. SC National Bank, 354 S.E.2d. 895, 292 SC 51, 53 (1987), *citing* C & S Real Estate Services v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). The judge then has two options. “He may either order separate trials pursuant to rule 42(b) or may order the claims tried in a single proceeding.” Johnson at 55. However, the judge must ensure that, “a joint trial will not deprive a party of his right

to a full jury trial of legal issues.” Id. In this case, the Court ordered the actions to be tried by the Master in Equity, who sits without a jury.

Rule 53(b) SCRCF governs references to masters in equity and how jury demands are to be handled. It states:

In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court....

The parties did not consent to the reference and this is not a default case. Neither is this just an action for foreclosure; the Defendants raised compulsory legal counterclaims.

Rule 53 cannot be read to allow the violation of the right to a jury trial just because the plaintiff bundled a foreclosure with legal causes of action.

Furthermore, Rule 53 sets up a procedure that once a jury demand is made, “the matter **shall** be returned to the circuit court.” (emphasis added). This is a definite command. It stands to reason that if the demand has been made then this same language bars a subsequent reference without consent as an action void *ab initio*.

Finally, when legal and equitable issues co-exist in the same action, “the legal issues must be determined first, and the findings of the jury are binding on the sitting judge as trier of the equitable claims.” Id. The reference is premature and should not take place until after the jury issues are decided. Allowing the foreclosure to proceed first violates this principle.

Furthermore, this Order of Reference was issued and signed by the Clerk of Court

when it should have not been. “[T]he clerk does not retain this power to refer a case when a party has already made a valid jury demand. To hold otherwise would give the clerk the power to disregard a demand made in the pleadings and require a party seeking a jury trial to file a second jury demand once the party's case was referred without the party's consent.” S.C. Cmty. Bank v. Salon Proz, LLC, 800 S.E.2d 488, 420 S.C. 89, 95-96 (S.C. App. 2017).

WHEREFORE Appellants request that this Court Reinstate the Appellant’s Appeal.

THE FRENCH LAW FIRM, LLC

June 3, 2022

/s/Shawn M. French, Sr.  
Shawn M. French, SC BAR No.: 75007  
Attorney for Appellants  
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STATE OF SOUTH CAROLINA  COUNTY OF RICHLAND	IN THE CIRCUIT COURT FOR THE JUDICIAL CIRCUIT  CASE NO: 2019-CP-40-4738
US Bank NA, as Trustee,  PLAINTIFF  v.  Michael R. Capers, Sheron K. Capers, et.al.,  DEFENDANT	Answer to Complaint Of Defendants Michael R. Capers, Sheron K. Capers Jury Trial Demanded

Defendants Michael R. Capers and Sheron K. Capers above would respectfully show unto this Court:

1. That each and every allegation of the Complaint is denied unless specifically admitted herein.
2. That, as to the allegations of Paragraph 1, Defendants deny the allegations and state that they are without information or belief as to the remaining allegations.
3. Responding to Paragraph 2, the Defendants admit the allegations.
4. That the allegations of Paragraphs 2,3,4, and 5 and are admitted.
5. Responding to Paragraph 6, the Defendants deny the allegations and demand strict proof.
6. That, as to Paragraph 7, Defendants deny same and demand strict proof thereof.
7. Responding to Paragraph 8, the Defendants admit the facts that are of public record, but deny all other allegations and demand strict proof of these allegations.
8. The Defendants have no knowledge of any assignments so deny the allegations of Paragraph 9 and 10.
9. That the allegations of Paragraphs 11, 12, 13, and 14 are denied and strict proof demanded thereof.
10. That, as to the allegations of Paragraphs 15, 16, 17, 18, 19, and 20 the Defendants deny any allegations against them and deny any inferences that are legal conclusions.
11. As to the allegations in Paragraph 20, 21, 22 and 23 the Capers strictly deny those allegations and state that it was the mortgage company that breached first. The Capers owe nothing under any alleged note and mortgage.

**FOR A SECOND DEFENSE**

12. That Defendants repeat and incorporate herein the preceding allegations of Paragraphs 1-11.

13. That Plaintiff has refused and continues to refuse to apply properly the monthly mortgage payments made by Defendants.

**FOR A THIRD DEFENSE**

14. That Defendants repeat and incorporate herein the preceding allegations of Paragraphs 1-13.

15. That Plaintiff has agreed on occasion to remove from Defendants' account certain charges which were erroneous, improper or questionable only to reinstate them at a subsequent date.

**FOR A FOURTH DEFENSE**

16. That Defendants repeat and incorporate herein the preceding allegations of Paragraphs 1-15.

17. That, among other things, Plaintiff has accused Defendants of failing to pay taxes on their home that were due prior to their purchasing it.

18. That the taxes were in fact paid at closing on the home but the closing attorney failed to remit the taxes to Richland County.

**FOR A FIFTH DEFENSE**

19. That Defendants repeat and incorporate herein the preceding allegations of Paragraphs 1-18.

20. That Defendants have repeatedly tendered payments to Plaintiff that would have kept their account current but Plaintiff has refused to accept them.

**FOR A SIXTH DEFENSE: PLAINTIFF'S LACK OF STANDING**

21. That Defendants repeat and incorporate herein the preceding allegations of Paragraphs 1-20.

22. Defendants deny that Plaintiff has adequate standing to bring this action.

23. Defendants have not been provided with a copy of the assignments or the documents alleged in the Plaintiff's Complaint.

24. Defendants have no personal knowledge of the assignments.

25. Therefore, Defendants assert the affirmative defense and denies Plaintiff has standing to pursue this action and Defendants request that the court dismiss the Plaintiff's complaint.

**FOR A SEVENTH DEFENSE: ACCOUNTING**

26. Defendants incorporate by reference paragraphs 1 through 25 of their answer.

27. Defendants demand that an accounting be completed to determine that if an amount is determined to be due the Plaintiff, it is the correct amount.

**FOR AN EIGHTH DEFENSE: LACHES**

28. Defendants incorporate by reference paragraphs 1 through 27 of their answer.
29. The Plaintiff has unreasonably delayed seeking to enforce any rights they believed they have.
30. According to the complaint, the last payment was made in 2003, more than 16 years since this action was brought. There was a prior case from 2004 that was dismissed in 2017, but the Plaintiff did not pursue that matter until now.
31. This delay was unreasonable and has prejudiced the defendants. This delay has caused the loss or destruction of evidence in this matter.
32. The Plaintiff was negligent in not pursuing any claimed right sooner and the Plaintiff's negligence has prejudiced the Defendants. For this reason, the Plaintiff should be denied the equitable remedy of Foreclosure.

**FOR A NINTH DEFENSE: RESERVATION OF AFFIRMATIVE DEFENSES**

33. Defendants incorporate by reference paragraphs 1 through 32 of their answer.
34. The Defendants specifically plead and reserve as affirmative defenses to the Plaintiff's Complaint, accord and satisfaction, comparative negligence, duress, fraud, illegality, laches, no contract, statute of limitations, misrepresentation, unclean hands, mistake, payment, release, waiver, lack of consideration or any affirmative defense that may become available as discovery develops in this action.

**FOR A TENTH DEFENSE: NON-WAIVER**

35. Defendants incorporate by reference paragraphs 1 through 34 of their answer.
36. The Defendant does not waive but reserve the right to any further defenses, counterclaims, or crossclaims that may be revealed through discovery.

**FOR A ELEVENTH DEFENSE AND FIRST COUNTERCLAIM**

**Violation of the South Carolina Unfair Trade Practices Act**

37. That Defendants repeat and incorporate herein the preceding allegations of Paragraphs 1-20.
38. That Plaintiffs are engaged in trade and commerce that affects the people of the State of South Carolina, directly and indirectly.

39. That Plaintiff is a mortgage lender engaged in the business of making loans to the public for the purchase of real estate.
40. That Plaintiff, or its predecessor in interest, loaned funds to Defendants Michael R. Capers and Sheron K. Capers to purchase a lot with improvements thereon at 309 Rolling Creek Circle, Irmo, South Carolina 29063.
41. That the loan was secured by a mortgage placed on the property being purchased by said Defendants.
42. That during the course of servicing the loan, Plaintiff or its predecessor in interest did the following:
  - a. Failed or refused to account properly for funds in Defendants Michael R. Capers and Sheron K. Capers' escrow account.
  - b. Lost or mis-applied a monthly mortgage payment made by Defendants and refused to correct the error.
  - c. Falsely report to credit reporting agencies that Defendants had not made the payment Plaintiff lost or misapplied.
  - d. Force placed insurance on the property owned by Defendants even though the property was already insured by Defendants.
  - e. Charged an exorbitant premium for the force placed insurance.
  - f. Refused to provide Defendants with an accounting of their mortgage payments and escrow account despite repeated requests.
  - g. Refused to correct account errors that Defendants pointed out to Plaintiff.
  - h. Unfairly increased Defendants' mortgage payments because of errors by Plaintiff.
43. That the actions described above are unfair or deceptive acts or practices in the conduct of trade and commerce.
44. That Plaintiff knew, or should have known, that the acts or practices complained of herein are unfair or deceptive acts or practices in the conduct of trade and commerce.
45. That this counterclaim is brought in the public interest as the acts or practices complained of herein are capable of repetition.
46. That Defendants have been damaged by Plaintiff's employment and use of unfair or deceptive acts or practices in the conduct of trade and commerce.
47. That Defendants are entitled to judgment against Plaintiff for actual damages suffered, to have those damages trebled, and to reasonable attorneys' fees.

## **FOR A TWELTH DEFENSE AND SECOND COUNTERCLAIM**

### **Breach of Contract**

48. That Defendants repeat and incorporate herein the preceding allegations of Paragraphs 1-47.
49. The Defendants state that it was the Plaintiff who first breached the agreement by its actions. A Party who breaches a contract cannot then bring a cause of action against another party for breach when they were the first cause of breach.

50. For this reason, the Plaintiff's request for foreclosure should be denied.

**FOR A THIRTEENTH DEFENSE, THIRD COUNTERCLAIM:  
FAILURE TO ASCERTAIN ATTORNEY PREFERENCE UNDER  
S.C. CODE ANN. 37-10-102(a)(1) (1976)**

51. Defendants incorporate by reference paragraphs 1 through 50 of their Answer.

52. The Plaintiff made no attempt to ascertain the attorney preference of Defendant prior to the closing of the loan that is the subject of this action.

53. The Defendant was denied her statutory right to obtain counsel of her own choice.

54. The Plaintiff violated S.C. Code Ann. section 37-10-102(a)(1) by not ascertaining Defendant's attorney preference prior to the closing.

55. The Defendant is entitled to all actual damages from the denial of their right to attorney preference and \$7,500.00 in statutory punitive damages for each violation and her attorneys' fees for bringing this Counterclaim.

**FOR A FOURTEENTH DEFENSE, FOURTH COUNTERCLAIM:  
VIOLATION OF 15 U.S.C. 1641**

56. Defendants incorporate by reference paragraphs 1 through 55 of their Answer.

57. Defendants state that this is their primary residence and the loan that is the subject of this action and as such is governed by the Federal Truth in Lending Act.

58. Defendant states that there have been transfers of ownership of the note and mortgage that the Defendant was not notified of the transfers within 30 days and was not given the information under 14 U.S.C. 1641.

59. Defendant requests that this court award actual damages and any statutory damages allowed by law, and costs and attorney's fees.

WHEREFORE, having set forth their Answer and Counterclaim, Defendants Michael R. Capers and Sheron K. Capers pray that this court dismiss Plaintiff's complaint, award Defendants actual and trebled damages, award Defendants reasonable attorneys' fees and grant such other and further relief as the court and deem just and proper.

WHEREFORE, having fully answered the Complaint herein, the Defendants

- (1) Request that this matter be heard before a Jury;
- (2) Expressly deny that the Plaintiff is entitled to any relief requested;
- (3) Pray that the Plaintiff's Complaint be dismissed with prejudice;
- (4) Pray that the court award Defendants actual damages in accord with the Counterclaims;
- (5) Pray that the court award Defendants Statutory damages;
- (6) Pray that the mortgage claimed by the Plaintiff be satisfied of record.
- (7) That Defendants' costs and attorneys' fees be taxed against the Plaintiff;
- (8) And for such other and further relief as this Court may deem Just and Proper.

September 26, 2019

/s/Shawn M. French

Shawn M. French  
Attorney for Mr. and Mrs. Capers  
SC BAR No.: 75007  
1476 Ben Sawyer Blvd, Ste. 3  
Mount Pleasant, SC 29464

I, the undersigned, so hereby certify that I have this 26<sup>th</sup> day of September, 2019 caused the foregoing Answer to Complaint and Counterclaims to be served on the Attorneys of record by depositing in the US MAIL, postage prepaid, addressed as follows:

Dean Hayes  
PO BOX 212069  
Columbia, SC 29209

/s/Shawn M. French

Shawn M. French

THE STATE OF OHIO  
COUNTY OF RICHLAND

IN THE COUNTY OF RICHLAND  
STATE OF OHIO  
Case No. 2019CP4004738

That the undersigned is the duly authorized agent of the Trustee of the Mortgage Loan Trust, which is the owner of the property described in the attached plat, and that the undersigned is the duly authorized agent of the Mortgagee of the Mortgage Loan Trust, which is the owner of the property described in the attached plat.

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That the undersigned is the duly authorized agent of the Trustee of the Mortgage Loan Trust, which is the owner of the property described in the attached plat, and that the undersigned is the duly authorized agent of the Mortgagee of the Mortgage Loan Trust, which is the owner of the property described in the attached plat.

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(21184.2)

**SUMMONS  
(NON-JURY)  
FORECLOSURE OF REAL ESTATE**

**TO: THE ABOVE NAMED DEFENDANTS:**

That the undersigned is the duly authorized agent of the Trustee of the Mortgage Loan Trust, which is the owner of the property described in the attached plat, and that the undersigned is the duly authorized agent of the Mortgagee of the Mortgage Loan Trust, which is the owner of the property described in the attached plat.

**MCCABE, TROTTER, & BEVERLY, P.C.**

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E-mail: [\\_\\_\\_\\_\\_@\\_\\_\\_\\_\\_](mailto:_____@_____)

**ATTORNEY FOR PLAINTIFF**

\_\_\_\_\_

**THIS COMMUNICATION IS FOR THE PURPOSE OF COLLECTING A DEBT.  
ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**





Mr. [Name] 2121 Mr. [Name] [Address] [City] [State] [Zip] [Phone] [Email] [Fax] [Website] [Social Media] [Other Contact Info]

B. [Name] [Address] [City] [State] [Zip] [Phone] [Email] [Fax] [Website] [Social Media] [Other Contact Info]

1. T. [Name] [Address] [City] [State] [Zip] [Phone] [Email] [Fax] [Website] [Social Media] [Other Contact Info]

11. T. Mr. [Name] [Address] [City] [State] [Zip] [Phone] [Email] [Fax] [Website] [Social Media] [Other Contact Info]

12. T. [Name] [Address] [City] [State] [Zip] [Phone] [Email] [Fax] [Website] [Social Media] [Other Contact Info]

**THIS COMMUNICATION IS FOR THE PURPOSE OF COLLECTING A DEBT.  
ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

1. The undersigned is a duly licensed and qualified attorney at law in the State of Ohio and is duly admitted to practice law in the State of Ohio. My office is located at 1234 Main Street, Columbus, Ohio 43201. My telephone number is 614-555-1234 and my fax number is 614-555-5678.

1. I am a duly licensed and qualified attorney at law in the State of Ohio and am duly admitted to practice law in the State of Ohio. My office is located at 1234 Main Street, Columbus, Ohio 43201. My telephone number is 614-555-1234 and my fax number is 614-555-5678. My e-mail address is [redacted]@[redacted].com.

1. I am a duly licensed and qualified attorney at law in the State of Ohio and am duly admitted to practice law in the State of Ohio. My office is located at 1234 Main Street, Columbus, Ohio 43201. My telephone number is 614-555-1234 and my fax number is 614-555-5678. My e-mail address is [redacted]@[redacted].com.

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1. I, the undersigned, do hereby certify that the information provided in this document is true and correct to the best of my knowledge and belief.

2. I, the undersigned, do hereby certify that the information provided in this document is true and correct to the best of my knowledge and belief.

3. I, the undersigned, do hereby certify that the information provided in this document is true and correct to the best of my knowledge and belief.

4. I, the undersigned, do hereby certify that the information provided in this document is true and correct to the best of my knowledge and belief.

5. I, the undersigned, do hereby certify that the information provided in this document is true and correct to the best of my knowledge and belief.

6. I, the undersigned, do hereby certify that the information provided in this document is true and correct to the best of my knowledge and belief.

**THIS COMMUNICATION IS FOR THE PURPOSE OF COLLECTING A DEBT.  
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**RECEIVED**

**Jun 03 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Jeannette W. McBride, Clerk of Court

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Case No. 2019-CP-40-4738  
Appellate Case No.: 2022-00327

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U.S. National Bank  
Association, as Trustee  
Successor in Interest to  
Wachovia Bank, National  
Association f/k/a First Union  
National Bank, as Trustee for  
Long Beach Mortgage Loan  
Trust 2001-4,

Respondent,

v.

Michael R. Capers, Sheron K.  
Capers, South Carolina  
Department of Revenue,  
County of Richland, and  
Rolling Creek Community  
Homeowners Association,  
Inc.,

Of whom, Michael Capers and  
Sheron Capers are the

Appellants.

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Proof of Service

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I certify that I have served the Motion to Reinstate by emailing a copy of it to the email address on record in AIS, to the attorneys of record listed below.

Dean Hayes  
[dean.hayes@mccabetrotter.com](mailto:dean.hayes@mccabetrotter.com)

Kiera Dillon  
[kiera.dillon@dor.sc.gov](mailto:kiera.dillon@dor.sc.gov)

Lauren Hogan  
[Hogan.lauren@richlandcountysc.gov](mailto:Hogan.lauren@richlandcountysc.gov)

June 3, 2022

/s/Shawn M. French, Sr.  
Shawn M. French, Sr.



**RECEIVED**  
**Jun 03 2022**  
**SC Court of Appeals**

JUNE 3, 2022

**VIA EMAIL**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: US Bank N.A. v. Michael Capers, et al.  
Case No.: 2019-CP-40-4738  
Appellate Case No.: 22-0327

To Whom It May Concern,

I am emailing the Motion to Reinstate along with the Proof of Service in the above referenced case for Michael Capers and Sheron Capers. I am sending the filing fee of \$50 via US Mail.

If you have any questions, you can contact me at the above number.

Sincerely,

Shawn M. French  
Cc File  
Dean Hayes  
Sheron Capers and Michael Capers