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Out of Luck: The Effect of the North Carolina Supreme Court's Decision in In Re Lucks and its Impact on the Law of Foreclosures

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ABSTRACT

Since the early 1700s, defaulting borrowers have lost property to foreclosures by power of sale. Traditionally, North Carolina courts have understood the Rules of Civil Procedure to apply to foreclosures by power of sale. The issue of whether subsequent defaults on the same debt were barred by the doctrine of claim preclusion and the two-dismissal rule often occurred. In re Lucks, *a 2016 case from the North Carolina Supreme Court, held that the Rules and doctrines do not apply to foreclosures by power of sale. This decision failed to settle the confusion around the application of the Rules to foreclosures by power of sale, and in fact caused much more confusion. This Comment addresses the problems with the decision, as well as their implications, and suggests that the legislature must step in to resolve the issue promulgated by* Lucks.

INTRODUCTION

Imagine a young family who wants to purchase a home. Like most other homeowners in North Carolina, the family purchases the home using a loan secured by a deed of trust. Then, Wife loses her job. Husband gets hurt and cannot work. They start falling behind on their payments. Eventually, Wife finds another job. However, before they can begin making payments again, Lender forecloses. At the hearing, an evidence issue prevents Lender from successfully foreclosing. The family again starts making payments. Before long, however, Lender again forecloses. Though the family has not missed another payment, it has not paid enough to cure the previous default. Even though Lender has already tried to foreclose and failed, it is allowed to bring another foreclosure on the same debt—the same claim it had before.

Before the North Carolina Supreme Court decided *In re Lucks*,[1] this situation would have played out much differently. The Rules of Civil Procedure's preclusion doctrines would have barred the second foreclosure;[2] however, *Lucks* held that the Rules of Civil Procedure do not apply to foreclosures by power of sale.[3]

This Comment evaluates whether the conclusion in *In re Lucks* that foreclosures by power of sale do not have to comply with the Rules of Civil

1. *In re* Lucks, 794 S.E.2d 501 (N.C. 2016).

2. *See, e.g.*, *In re* Herndon, 781 S.E.2d 524, 525 (N.C. Ct. App. 2016); *In re* Rogers Townsend & Thomas, PC, 773 S.E.2d 101, 103 (N.C. Ct. App. 2015); *In re* Garvey, 772 S.E.2d 747, 750 (N.C. Ct. App. 2015); Lifestore Bank v. Mingo Tribal Pres. Tr., 763 S.E.2d 6, 9 (N.C. Ct. App. 2014).

2. *Lucks*, 794 S.E.2d at 507.

3. *Id.*

Procedure was correct.[4] In so doing, this Comment examines the extent to which foreclosures by power of sale have a judicial nature, discussing separately the hearings before the clerk of court and subsequent de novo appeals in the superior court. Part I provides an overview and history of the law of foreclosures by power of sale, focusing on North Carolina law. It addresses the process of foreclosures by power of sale, their contractual nature, and their prior interaction with Rule 41 of the North Carolina Rules of Civil Procedure.[5] Part II examines the *Lucks* case, explaining both the majority opinion, written by Justice Newby, and Justice Hudson's concurring opinion. Part III critiques the majority opinion in *Lucks* and suggests the way it should have been decided, using Justice Hudson's concurrence as a guide. It also discusses the implications of the decision. Part IV suggests the best solution to the problem, petitioning the North Carolina legislature to step in.

I. FORECLOSURES IN NORTH CAROLINA: GENERAL NATURE AND INTERACTION WITH RULE 41 OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE

Mortgage foreclosures bring up several important issues, only one of which will be considered in this Comment—how claim preclusion, the two-dismissal rule, and other Rules of Civil Procedure interact with foreclosures. This Part seeks to provide background information about foreclosures in North Carolina and some of the issues that accompany them. It provides overviews of: (1) the general law of foreclosures in North Carolina; (2) the history and development of foreclosures by power of sale in North Carolina; (3) the special operations of foreclosures by power of sale; and (4) the interaction between foreclosures by power of sale and the North Carolina Rules of Civil Procedure. Understanding these issues is crucial to understanding both the decision in *Lucks* and its consequences.

A. Foreclosure Law in North Carolina

Mortgages and deeds of trust[6] occur when a borrower enters an agreement with a lender to pay back money loaned to him so he can purchase

4. *Id.*

5. This Comment focuses especially on Rule 41 because it is the rule relevant to *In re Lucks*.

6. Mortgages and deeds of trust differ from one another but operate in much the same way for purposes of this Comment. 1 JAMES A. WEBSTER, JR. ET AL., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 13.02[1] (6th ed. 2017) ("Although there are technical and theoretical differences between lien and title theories and between two-party mortgages and three-party deeds of trust, the different theories and formats often have the same practical

real estate.[7] When a borrower gives a mortgage to the lender, he agrees to give up the property if he does not repay the lender in full through periodic installments.[8] If the borrower defaults, the lender can foreclose and sell the property to get his money back.[9] In North Carolina, this foreclosure can take one of two forms: judicial foreclosure or foreclosure by power of sale.[10] A judicial foreclosure occurs where the lender brings an action to the court in order to take title to the land that was used as security.[11] Foreclosures by power of sale occur where the lender forecloses based on a process spelled out in the original instrument between the lender and the borrower rather than going through the courts.[12]

B. History and Modern Interpretation of Foreclosures by Power of Sale

North Carolina adopted foreclosures by power of sale from the common law, dating back to as early as 1729.[13] Originally, North Carolina allowed purely nonjudicial foreclosures by power of sale—the courts were not involved at all in the action itself.[14] The foreclosure statute in effect before 1975 provided for little judicial interference, which translated to little protection for borrowers.[15] It required notice, but allowed it to occur in ways that were often illusory—personal notice was not required.[16] The statute

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effect."). Deeds of trust are often spoken of together with mortgages under the name "mortgage." *Id.* This Comment will likewise refer to both as a "mortgage."

7. *See id.*

8. *See* Andrew J. Bernhard, *Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures*, 88 FLA. B. J. 31, 31 (2014).

9. 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6.

10. *Id.* at § 13.29.

11. Note, *Strict Foreclosure: A Neglected Remedy*, 25 VA. L. REV. 947, 950–51 (1939) ("[S]trict foreclosure operates merely to make [the lender's] title absolute. In fact, it is closely analogous to a suit to quiet title." (footnotes omitted)).

12. *See* 4 N.C. BAR ASS'N FOUND., NORTH CAROLINA GENERAL PRACTICE DESKBOOK § IV.IV.I.C.3 (3d ed. 2004); Cem Demiroglu et al., *State Foreclosure Laws and the Incidence of Mortgage Default*, 57 J.L. & ECON. 225, 234 (2014).

13. *See Sales and Titles Under Deeds of Trust*, 11 AM. L. REG. 641, 643 (1863); *cf.* 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 147 (John M. Gould ed., 14th ed. 1896) ("Lord Eldon considered [foreclosure by power of sale] to be an extraordinary power, of a dangerous nature, and one which was unknown in his early practice."); *see generally* 2 RICHARD HOLMES COOTE, A TREATISE ON THE LAW OF MORTGAGE 129–35 (2d. ed. 1821) (providing a detailed discussion of the earliest cases on foreclosures by power of sale).

14. 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.31[1]; *see also* N.C. GEN. STAT. §§ 45-21.15–21.27 (1974).

15. *See* Durant M. Glover, Comment, *Real Property: Changes in North Carolina's Foreclosure Law*, 54 N.C.L. REV. 903, 905 (1976).

16. *See id.* In fact, North Carolina courts consistently held that personal notice was not necessary. *Id.*

provided that, absent a different procedure described in the instrument itself, notice should be given in two ways: (1) by posting notice on the door of the courthouse; and (2) by publishing the notice in a newspaper of the relevant county.[17] The courthouse posting had to be up for thirty days before the sale, and the newspaper posting had to be printed for four weeks before the sale.[18] The statute contained more details regarding notice by newspaper.[19] However, the statute did not require that the borrower have the opportunity to be heard prior to the foreclosure.[20] Since courts were not involved in the proceeding itself,[21] many of the earliest North Carolina cases only came to court when borrowers requested injunctions to prevent sales.[22] Foreclosures by power of sale came to be the preferred method since they can be resolved much more quickly and easily than judicial foreclosures.[23]

In 1975, a decision by the United States District Court for the Western District of North Carolina, *Turner v. Blackburn*,[24] resulted in a change to the state's foreclosure law.[25] In that case, the plaintiff, Mrs. Turner, owned property encumbered by two deeds of trust.[26] When she defaulted on the second deed of trust, the lender put notice of the approaching foreclosure

17. N.C. GEN. STAT. § 45-21.17 (1966).

18. *Id.*

19. *Id.*

20. *See id.*

21. Clerks *did* have a role in foreclosures by power of sale, but it was insignificant as a practical matter and did not call for them to be heavily involved—lenders had to file reports with clerks to show that parts of the foreclosure, including the sale itself and notice, had taken place. *See* N.C. GEN. STAT. §§ 45-21.26, -21.33 (1966). Clerks had no obligation to evaluate the truth of the reports: they only had to read and record them. *See id.* Though the United States District Court for the Western District of North Carolina later held that the clerk was involved enough to show "state action," that court focused on one step of the process—a step that does not always occur—and let it represent the whole. *See infra* text accompanying notes 31–32.

22. *See, e.g.*, Mosby v. Hodge, 76 N.C. 387 (1877); Kornegay v. Spicer, 76 N.C. 95 (1877); Chavasse v. Jones, 73 N.C. 492 (1875); Harrison v. Battle, 16 N.C. (1 Dev. Eq.) 537 (1830).

23. 4 N.C. BAR ASS'N FOUND., *supra* note 12, at § IV.IV.V.A; 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.31[1]; Debra Pogrund Stark, *Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws*, 51 OKLA. L. REV. 229, 232 (1998); *Sales and Titles Under Deeds of Trust*, *supra* note 13, at 645; *see* KENT, *supra* note 13 (calling foreclosures by power of sale "so convenient, that they are gaining ground very fast upon the mode of foreclosure by process . . . .").

24. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

25. *See* Glover, *supra* note 15, at 916 ("[T]he dilemma faced by attorneys in North Carolina following *Turner* was alleviated by the passage of substantial amendments to the foreclosure statutes on June 6, 1975." (citation omitted)).

26. *Turner*, 389 F. Supp. at 1251.

sale on the door of the courthouse and in the newspaper.[27] On February 15, 1973, defendant Watts bought the property.[28] Approximately a month later, Mrs. Turner learned of the sale when Watts went to look at the property and informed her that it no longer belonged to her.[29] Mrs. Turner sued, claiming that the North Carolina laws on foreclosures by power of sale violated the Due Process Clause of the Fourteenth Amendment.[30] The court agreed and held that the North Carolina foreclosure laws violated the Due Process Clause.[31]

The court found state action by looking to the clerk's active role in cases involving upset bids.[32] Although upset bids did not come up in this case, the court explained that it made no difference because foreclosure proceedings should be viewed as a whole, not by "examin[ing] the various elements of the foreclosure proceeding as disparate bits and pieces."[33] The court went on to hold that due process required that lenders give personal notice to borrowers before foreclosing.[34] It reasoned: "To propose to a homeowner that he trek to the courthouse or spend 20 cents to examine fine-print legal notices, *daily* for the duration of a 20-year mortgage, as his sole protection against summary eviction, seems to us to offer him nothing of value."[35]

State courts throughout the United States, including North Carolina courts, declined to follow *Turner*.[36] However, the North Carolina legislature did not ignore the decision.[37] On June 6, 1975, the foreclosure statutes were amended.[38] The amendments added to section 45-21.17 by further requiring that the lender mail notice to "each party entitled to notice of the hearing" and to anyone who requests notice.[39] Additionally, a new "Notice and

27. *Id.* at 1251–52.

28. *Id.* at 1253.

29. *Id.* at 1253 n.10.

30. *Id.* at 1254. The Due Process Clause of the 14th Amendment states, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

31. *Turner*, 389 F. Supp. at 1254.

32. *Id.* at 1256. An upset bid occurs after a foreclosure sale when, within ten days of the sale, someone offers to buy the property for a certain percentage higher than the buyer's price at the sale. N.C. GEN. STAT. § 45-21.27(a) (2017); 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.30[4].

33. *Turner*, 389 F. Supp. at 1257–58.

34. *Id.* at 1259.

35. *Id.* at 1258.

36. Glover, *supra* note 15, at 915.

37. *See id.* at 916.

38. *Id.*

39. N.C. GEN. STAT. § 45-21.17(4) (1975).

[H]earing" statute was added.[40] Under section 45-21.16, a borrower is entitled to a hearing in front of the clerk before the foreclosure can occur.[41] Both at that time and today,[42] the lender attends a hearing before the clerk of court.[43] This hearing has its own notice requirements.[44] At the hearing, the clerk determines whether: (1) a valid debt exists; (2) the borrower defaulted on the debt; (3) the instrument gives the lender a foreclosure right; and (4) the foreclosure is not otherwise barred or subject to special rules.[45] If the clerk finds all these elements to be met, the lender can go ahead with the foreclosure sale unless the borrower appeals.[46] The borrower has the right to appeal to the superior court, where these issues will be reviewed de novo.[47]

C. *Foreclosure by Power of Sale as Contract*

Notwithstanding the rights of section 45-21.16, North Carolina courts recognize foreclosures by power of sale to be contractual in nature.[48] Courts have interpreted this to mean that foreclosures by power of sale constitute a private remedy.[49] Until 2016, the proceedings were considered to be subject

40. *Id.* at § 45-21.16.

41. *Id.*

42. *See id.*; 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.32[3][a].

43. *See* 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.32[3][a].

44. *Id.* at § 13.32[2].

45. *See id.* at § 13.32[3][a]. The clerk also ensures that the foreclosure is permissible by two other statutes, dealing with home loan and military service. *See id.*; *see also* N.C. GEN. STAT. §§ 45-101(1b) (defining "home loan"), 45-102, 45-21.12A (2017).

46. *See* 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.32.

47. *Id.* at § 13.32[4].

48. *See, e.g.*, Worley v. Worley, 199 S.E. 82, 83 (N.C. 1938); *In re* Michael Weinmann Assocs. Gen. P'ship, 424 S.E.2d 385, 388 (N.C. 1993); Eubanks v. Becton, 73 S.E. 1009, 1011 (N.C. 1912); *In re* Clayton, 802 S.E.2d 920, 925 (N.C. Ct. App. 2017); *In re* Draffen, 731 S.E.2d 435, 438 (N.C. Ct. App. 2012) (quoting *In re* Burgess, 267 S.E.2d 915, 918 (N.C. Ct. App. 1980)); 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6.

49. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Pinkney, 800 S.E.2d 412 (N.C. 2017); *In re* Goddard & Peterson, PLLC, 789 S.E.2d 835 (N.C. Ct. App. 2016); *In re* Herndon, 781 S.E.2d 524, 525 (N.C. Ct. App. 2016); 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.31[1].

to the Rules of Civil Procedure[50] and Rules of Evidence.[51] In this way, foreclosures by power of sale functioned as a private contractual action, but retained some judicial qualities by applying the Rules of Civil Procedure and Evidence.[52] Courts typically recognized this by calling foreclosures by power of sale "special proceeding[s]," followed by language indicating the—to some extent—judicial nature of the action.[53] This remained the accepted rule until the North Carolina Supreme Court's recent decision in *In re Lucks*.[54]

D. Foreclosures by Power of Sale and Rule 41

Until *Lucks*, foreclosures by power of sale enjoyed an interesting history of interaction with Rule 41 of the Rules of Civil Procedure. In North Carolina, this Rule allows a plaintiff to dismiss his action voluntarily—for any reason—before a certain point in the procedure.[55] The plaintiff can dismiss the action without prejudice at any point before resting his case, or

50. *Herndon*, 781 S.E.2d at 527 (applying Rule 41); *Goddard & Peterson, PLLC*, 789 S.E.2d at 839 (applying Rule 36); *In re* Rogers Townsend & Thomas, PC, 773 S.E.2d 101, 103 (N.C. Ct. App. 2015) (applying Rule 41); *In re* Garvey, 772 S.E.2d 747, 750 (N.C. Ct. App. 2015) (applying Rule 52); Lifestore Bank v. Mingo Tribal Pres. Tr., 763 S.E.2d 6, 9 (N.C. Ct. App. 2014) (applying Rule 41); 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.31[1]; *see In re* Collins, 797 S.E.2d 28, 32–33 (N.C. Ct. App. 2017) (discussing Rule 56(e)'s personal knowledge requirement in the context of a foreclosure by power of sale); *In re* Garrett, 795 S.E.2d 1, 4 (N.C. Ct. App. 2016) (discussing service requirements of the Rules of Civil Procedure); Phil Mechanic Const. Co. v. Haywood, 325 S.E.2d 1, 3 (N.C. Ct. App. 1985) ("[W]e do not agree that an order entered by the Clerk of Superior Court construing the validity of the debt and the trustee's right to foreclose, pursuant to [N.C. Gen. Stat. § 45–21.1 *et seq.*], cannot be *res judicata* as to a subsequent action based on the issues decided in the clerk's order.").

51. 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.31[1]; *see* In re *Goddard & Peterson, PLLC*, 789 S.E.2d 835 (discussing hearsay and other evidentiary rules in the context of foreclosure by power of sale); *In re* Brown, 577 S.E.2d 398 (N.C. Ct. App. 2003) (discussing hearsay in the context of foreclosure by power of sale).

52. *See, e.g.*, *In re* Vogler Realty, Inc., 722 S.E.2d 459, 467 (N.C. 2012) (Newby, J., dissenting); *Rogers Townsend & Thomas, PC*, 773 S.E.2d at 104; *Lifestore Bank*, 763 S.E.2d at 11; United Carolina Bank v. Tucker, 392 S.E.2d 410, 411 (N.C. Ct. App. 1990).

53. *See Vogler Realty, Inc.*, 722 S.E.2d at 467 (Newby, J., dissenting) ("Indisputably, a foreclosure by power of sale is a special proceeding. Clerks, then, have judicial power in a power of sale foreclosure proceeding."); *Rogers Townsend & Thomas PC*, 773 S.E.2d at 104 ("[A]n action for foreclosure by power of sale is a special proceeding, limited in jurisdiction and scope."); *Lifestore Bank*, 763 S.E.2d at 11 ("[A] foreclosure by power of sale is a type of special proceeding, limited in scope and jurisdiction."); *United Carolina Bank*, 392 S.E.2d at 411 ("A foreclosure by power of sale is a special proceeding commenced without formal summons and complaint and with no right to a jury trial.").

54. *In re* Lucks, 794 S.E.2d 501 (N.C. 2016).

55. *See* N.C. R. CIV. P. 41(a)(1).

by getting the other party to agree to dismissal.[56] If the plaintiff brings a case, dismisses it voluntarily, and again brings and dismisses the case, the second dismissal "operates as an adjudication upon the merits."[57] This rule is referred to as the "two-dismissal rule" and means that the plaintiff cannot bring an action involving the same transaction or occurrence for a third time.[58] In the context of foreclosures by power of sale, the issue centers on defining what constitutes the same transaction or occurrence.[59] Courts in some states consider a voluntary dismissal to concern only a single default on a single payment.[60] This means a second claim deals with a separate, subsequent default; therefore, it depends on a different transaction or occurrence.[61] On the other hand, courts in other states say that a foreclosure operates as a claim for default of the debt as a whole, meaning that a subsequent action necessarily involves the same transaction or occurrence.[62] This is often especially true in the presence of an acceleration clause.[63]

E. North Carolina's Treatment of Rule 41 in the Context of Foreclosures by Power of Sale

The North Carolina Court of Appeals decided two major cases dealing with Rule 41 of the Rules of Civil Procedure and foreclosures by power of sale: *In re Foreclosure by Rogers Townsend & Thomas, PC*[64] and *In re*

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56. *Id.*

57. *Id.*

58. 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 41-4 (3d ed. 2007); 1 JAMES A. WEBSTER, JR. ET AL., *supra* note 6, at § 13.54[3].

59. Claim preclusion, or *res judicata*, involves the same test as the two-dismissal rule: the same "transaction, or series of connected transactions, out of which the [first] action arose." Kathleen M. McGinnis, *Revisiting Claim and Issue Preclusion in Washington*, 90 WASH. L. REV. 75, 83 (2015) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (AM. LAW INST. 1982)). For this reason, courts often use claim preclusion and the two-dismissal rule interchangeably. *See, e.g.*, *In re* Rogers Townsend & Thomas, PC, 773 S.E.2d; Singleton v. Greymar Assocs., 882 So. 2d 1004 (Fla. 2004); U.S. Bank Nat'l Ass'n v. Gullotta, 899 N.E.2d 987 (Ohio 2008).

60. *See, e.g.*, JOSE M. RODRIGUEZ, FLORIDA CIVIL PROCEDURE, Ch. 2, § 20-1 (3rd ed. 2018).

61. *See id.*

62. *See, e.g.*, *Gullotta*, 899 N.E.2d at 992.

63. *See generally id.* ("Once [the borrower] defaulted and [the lender] invoked the acceleration clause of the note, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note."). Acceleration clauses allow the lender to demand the entire balance due rather than the missed monthly payment. Bernhard, *supra* note 8.

64. *Rogers Townsend & Thomas, PC*, 773 S.E.2d at 103. Though the North Carolina Supreme Court vacated this case, it does not impact the analysis for purposes of this section because it was vacated as a result of the *Lucks* case.

Herndon.[65] In *Rogers Townsend & Thomas*, the borrower used a deed of trust to secure a loan for the purchase of real property.[66] After the borrower defaulted on her loan payments, the lender brought an action to foreclose by power of sale and gave her notice that it intended to accelerate the debt.[67] The borrower had the option to prevent both the acceleration of the debt and the foreclosure action itself if she paid off her entire debt before either occurred.[68] The lender voluntarily dismissed the action before the clerk made a decision.[69] However, when the borrower continued to default on her payments, the lender accelerated the debt and brought a subsequent foreclosure by power of sale action.[70] Again, the lender voluntarily dismissed the action.[71] The North Carolina Court of Appeals allowed the lender to bring a third foreclosure by power of sale action, holding that the first and second actions did not involve the same claim.[72] The court reasoned that the exact claim of the second case—more defaults on behalf of the borrower, which did not occur until after the lender brought the first foreclosure by power of sale action—could not have been brought in the first case, making the facts of each case different from one another.[73]

Herndon's facts were almost identical. Like in *Rogers Townsend & Thomas*, the borrower secured a loan for the purchase of real property with a deed of trust but then defaulted on payments.[74] The lender accelerated the debt before bringing a foreclosure by power of sale action.[75] After the lender voluntarily dismissed the foreclosure action, then brought and dismissed another one, the trial court did not allow it to bring a third foreclosure action.[76] The North Carolina Court of Appeals reversed, holding that, because the borrower continued to default after the first dismissal, the second case operated as a different claim.[77] The court relied almost exclusively on *Rogers Townsend & Thomas* to reach its result.[78]

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65. *In re* Herndon, 781 S.E.2d 524, 527 (N.C. Ct. App. 2016).
66. *Rogers Townsend & Thomas, PC*, 773 S.E.2d at 102.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 107–08.
73. *Id.* at 108.
74. *In re* Herndon, 781 S.E.2d 524, 525 (N.C. Ct. App. 2016).
75. *Id.*
76. *Id.*
77. *Id.* at 530.
78. *Id.* ("We perceive no difference between the relevant facts and procedural posture in *Rogers Townsend & Thomas* and the case before us."). The court further explained that, like

II. THE NORTH CAROLINA SUPREME COURT'S DECISION IN *IN RE LUCKS*

In re Lucks provides the latest indication of North Carolina's view on the way foreclosures by power of sale interact with the Rules of Civil Procedure.[79] The majority declared that the Rules do not apply to foreclosures by power of sale—either to the initial hearing before the clerk or to the subsequent appeal in the trial court.[80] This Part begins by introducing the facts and procedural history of *Lucks*, then explains the majority opinion as it pertains to the Rule 41 issue, and concludes by walking through Justice Hudson's concurring opinion.[81]

A. Facts and Procedural History

In re Lucks changed the way foreclosures by power of sale interact with the Rules of Civil Procedure in North Carolina. In *Lucks*, the borrower, Gordon Lucks, borrowed $225,000.[82] He agreed to pay the money back by monthly payments.[83] Lucks secured the loan with a deed of trust on his home, subject to a foreclosure by power of sale.[84] After Lucks failed to make the payments for nearly three years, a substitute trustee, the Ford Firm, started taking steps to foreclose by power of sale.[85] The Ford Firm had to take an involuntary dismissal[86] of the foreclosure because the firm failed to

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Rogers Townsend & Thomas, PC, the borrower continued defaulting between actions and the "'lender's election to accelerate payment on a note . . . [did] not necessarily place future payments at issue such that the lender [was] barred from filing subsequent foreclosure actions based upon subsequent defaults, or periods of default, on the same note.'" *Id.* (alteration in original) (quoting In re *Rogers Townsend & Thomas, PC*, 773 S.E.2d 101, 106 (N.C. Ct. App. 2015)).

79. *In re* Lucks, 794 S.E.2d 501 (N.C. 2016). *Lucks* deals with claim preclusion rather than the two-dismissal rule. As indicated, these two concepts operate in much the same way, and courts often use them in conjunction with one another. *See supra* note 58.

80. *Lucks*, 794 S.E.2d at 507.

81. A large part of both *Lucks* opinions centers on an evidentiary issue. That issue is beyond the scope of this Comment and will not be discussed.

82. *Lucks*, 794 S.E.2d at 503.

83. *Id.*

84. *Id.*; *In re* Lucks, No. COA15-581, 2016 WL 13211555, at *1 (N.C. Ct. App. Apr. 5, 2016), *rev'd*, 794 S.E.2d 501 (N.C. 2016).

85. *Lucks*, 794 S.E.2d at 503.

86. *Id.* The fact that this case dealt with involuntary dismissals while *Rogers Townsend & Thomas, PC*, and *Herndon* dealt with voluntary dismissals does not make a difference. Courts often use these doctrines interchangeably. Further, North Carolina courts have done so in the past. For example, in its decision in *Rogers Townsend & Thomas, PC*, the North Carolina Court of Appeals looked to a Florida case, Singleton v. Greymar Assocs., 882 So. 2d 1004 (Fla. 2004), to determine how the issue should be decided. *In re* Rogers Townsend & Thomas, PC, 773 S.E.2d 101, 105 (N.C. Ct. App. 2015). *Singleton* focused on claim

sufficiently prove it had been named substitute trustee.[87] The next year, a different substitute trustee, Cornish Law, PLLC, commenced another foreclosure by power of sale on the same note.[88] Again, the assistant clerk of court dismissed the case.[89] In the assistant clerk's opinion, the dismissal occurred because claim preclusion prevented Cornish law from bringing the same case again.[90] On appeal, the superior court held a de novo hearing[91] and eventually dismissed the case, because the court believed that the Rules of Evidence precluded several of the documents used to prove the right to foreclose.[92] The Court of Appeals reversed because of the evidentiary issues.[93]

B. *The Majority Opinion: Rules of Civil Procedure Do Not Apply to Foreclosures by Power of Sale*

In its majority opinion, adopted by four justices, the Supreme Court of North Carolina held that the superior court should not have dismissed the case with prejudice.[94] It held that the superior court should have simply considered the way foreclosures by power of sale work rather than applying claim preclusion.[95] The court said, "[n]on-judicial foreclosure is not a judicial action; the Rules of Civil Procedure and traditional doctrines of [claim preclusion] and collateral estoppel applicable to judicial actions do not apply."[96] In its reasoning, the majority recognized that the contractual nature of foreclosures by power of sale makes them nonjudicial.[97]

According to the court, the nonjudicial nature of foreclosures by power of sale means that the statute describing the foreclosure process would have

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preclusion and involuntary dismissals rather than the two-dismissal rule and voluntary dismissals, yet the court relied heavily on it to perform its analysis for the latter subject. *Id.* Thus, there is no reason to suppose the court would have any qualms about following cases dealing with the two-dismissal rule and voluntary dismissals to decide a case dealing with claim preclusion and involuntary dismissals.

87. *Lucks*, 794 S.E.2d at 503.

88. *Id.*

89. *Id.* at 503–04.

90. *Id.*

91. *Id.* at 504. On appeal, Deutsche Bank, who obtained the borrower's note from IndyMac Bank, took over as the plaintiff. *Id.* at 503.

92. *Id.* at 504; *In re* Lucks, No. COA15-581, 2016 WL 13211555, at *2 (N.C. Ct. App. 2016), *rev'd*, 794 S.E.2d 501 (N.C. 2016).

93. *Lucks*, 794 S.E.2d at 504; *Lucks*, No. WL 1321155, at *2–*3.

94. *Lucks*, 794 S.E.2d at 506–07.

95. *See id.* at 507.

96. *Id.*

97. *Id.* at 504.

to reference specifically the Rules of Civil Procedure in order for them to be applicable.[98] Without more thoroughly linking the chain of reasoning, the court held that the Rules of Civil Procedure do not apply to foreclosures by power of sale and overruled prior decisions suggesting otherwise.[99] When the lender fails to prove all the required elements for foreclosure by power of sale, the lender cannot proceed with the case; however, the court said the lender is not precluded from bringing a later action.[100] The lender can either opt to bring a *judicial* foreclosure, or bring a *different* foreclosure by power of sale on a *separate* default if the borrower defaults again.[101] The court explained that this result occurs without needing to apply the Rules of Civil Procedure: since foreclosures by power of sale are nonjudicial, when the lender stops the foreclosure it "is not a 'dismissal' but simply a withdrawal of the notice and has no collateral consequence."[102]

C. *Justice Hudson's Concurrence: The Problems with the Majority's Approach to the Rules of Civil Procedure*

Justice Hudson concurred in the result of the case, but declined to join the majority opinion. Writing for herself and two other justices, she agreed that the trial court should have excluded the evidence at issue.[103] She disagreed, however, with the majority's conclusion regarding the Rules of Civil Procedure.[104] Quoting the Rules of Civil Procedure,[105] Justice Hudson stated, "[T]he Rules themselves presume they apply in all proceedings in the courts unless a different procedure is prescribed."[106]

Justice Hudson's analysis centered on an important distinction from the majority: rather than considering foreclosures by power of sale as a whole, she argued that the hearing before the clerk of court and the de novo appeal to the superior court are two distinct parts.[107] As such, she maintained that they operate differently from one another.[108] She contended that the hearing

98. *Id.* at 505.

99. *Id.* at 507. *See generally* Part I.E.

100. *Lucks*, 794 S.E.2d at 506.

101. *Id.*

102. *Id.* at 505.

103. *Id.* at 507 (Hudson, J., concurring in the result).

104. *Id.*

105. Justice Hudson quoted Rule 1, which states, "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. R. CIV. P. 1.

106. *Lucks*, 794 S.E.2d at 507 (Hudson, J., concurring in result).

107. *Id.* (citing N.C. GEN. STAT. § 45-21.16 (2015)).

108. *Id.*

in front of the clerk of court was the only part of the procedure that could overcome the presumption that the Rules apply.[109] Section 45-21.16 sets out a specific, detailed procedure for the hearing before the clerk of court, rather than simply giving the borrower a right to a general hearing.[110] Because section 45-21.16 "prescribes a different procedure for the hearing before the clerk," as the Rules require, the procedure overcomes the presumption that the rules apply to the hearing.[111]

On the other hand, the de novo hearing before the trial court does *not* overcome the presumption in Justice Hudson's opinion.[112] Unlike the part of the statute that deals with the hearing, the section on the de novo appeal does not lay out a particular procedure.[113] Justice Hudson agreed with the majority that after the first foreclosure by power of sale is dismissed the lender must either (1) bring another foreclosure by power of sale on a different default or (2) opt to bring a judicial foreclosure instead.[114] But she maintained that the Rules of Civil Procedure should not be removed from the equation.[115] Therefore, Justice Hudson ultimately agreed with the majority that the Rules do not apply in the hearing before the clerk of court, but argued that they *do* apply in the de novo appeal before the trial court.[116]

III. THE PROBLEMS WITH *LUCKS*, HOW THE CASE SHOULD HAVE BEEN DECIDED, AND IMPLICATIONS

The majority opinion in *Lucks* had internal problems that could have been avoided by more closely following prior North Carolina decisions or by adopting Justice Hudson's approach. This Part explains these issues—such as the opinion's conflicts with North Carolina statutes, discussing separately the hearing and the de novo appeal. The problems in each illuminate the internal issues with the opinion and help bring to light the decision's repercussions.

109. *Id.*

110. N.C. GEN. STAT. § 45-21.16 (2017).

111. *Lucks*, 794 S.E.2d at 507 (Hudson, J., concurring in result) (citing N.C. GEN. STAT. § 45-21.16 (2015)).

112. *Id.*

113. *Id.* at 507–08.

114. *Id.* at 510.

115. *Id.*

116. *Id.* at 511.

A. Application of Judicial Rules to Hearing Before the Clerk of Court

If the majority in *Lucks* had followed prior North Carolina jurisprudence when deciding the issue of the hearing before the clerk of court, foreclosures by power of sale would still be subject to the Rules of Civil Procedure. Following the pattern of prior North Carolina cases, one might have expected the issue in *Lucks* to be resolved as it was in both *In re Foreclosure by Rogers Townsend & Thomas, P.C.*[117] and *In re Herndon.*[118] Both cases dealt with the issue of whether Rule 41(a) of the Rules of Civil Procedure (the two-dismissal rule) barred subsequent foreclosure by power of sale actions after the lender in each dismissed the second foreclosures.[119]

Both cases are so factually similar to *Lucks* that one would have expected the North Carolina Supreme Court to come to the same result in it—and for the same reasons—as in the other two. Like in *Rogers Townsend & Thomas* and *Herndon*, Lucks secured a loan with a deed of trust in order to purchase real property.[120] Just as in those two cases, the first attempt at a foreclosure by power of sale was dismissed.[121] Also like the prior cases, a Civil Procedure issue impacted subsequent foreclosures.[122] Based on these similarities, the most natural thing for the court to do would be to evaluate whether claim preclusion barred the next foreclosure. However, the court decided instead to depart from the prior cases, declaring that "[i]f the clerk or trial court does not find the evidence presented to be adequate to 'authorize' the foreclosure sale, this finding *does not implicate [claim preclusion]* or collateral estoppel in the traditional sense."[123]

As observed by Justice Hudson, the majority opinion "cit[ed] no authority" for the departure from the way the law has always been understood to work.[124] Though it cited authority for its discussion of the nature of foreclosures by power of sale, the majority opinion did not deal with the Civil Procedure issue extensively.[125] For example, rather than describing the nature of a foreclosure by power of sale, the majority defined it by essentially repeating its name: "*Non-judicial* foreclosure by power of

117. *In re* Rogers Townsend & Thomas, PC, 773 S.E.2d 101, 103 (N.C. Ct. App. 2015). *See supra* Part I.E.

118. *In re* Herndon, 781 S.E.2d 524 (N.C. Ct. App. 2016).

119. *See supra* Part I.C. *Lucks* does not deal with voluntary dismissals and Rule 41 directly; instead it deals with claim preclusion. As explained earlier, this does not impact the analysis. *See supra* note 59.

120. *Lucks*, 794 S.E.2d at 503.

121. *Id. See supra* note 86.

122. *Lucks*, 794 S.E.2d at 503.

123. *Id.* at 506 (emphasis added).

124. *Id.* at 507 (Hudson, J., concurring in result).

125. *Id.* at 504–05 (majority opinion).

sale arises under contract and *is not a judicial* procedure."[126] After discussing the basic requirements of section 45-21.16, the majority cited a Case Note to declare that claim preclusion does not apply to these actions.[127] It did not give any reason for this beyond stating that the Rules needed to be specifically opted into within the statute—a conclusion that itself lacked much support.[128] It did not discuss the prior North Carolina case law that applied the Rules of Civil Procedure to foreclosures by power of sale.[129] Although the court explained *its view* that the Rules do not apply, it failed to address completely *why* that view overcomes the counterargument that they do apply. The court overruled all prior North Carolina case history without explaining why the law supported its conclusion.

B. Application of Judicial Rules to the De Novo Hearing Before the Superior Court

Though the *Lucks* court's analysis regarding the hearing departs from prior North Carolina law, its analysis on the de novo appeal departs much more significantly. Had the court recognized the initial hearing and the de novo appeal as two separate parts with different rules, its decision on the appeal would not be nearly as problematic. Since it did not, its decision on the de novo appeal departs significantly from more than just the trend in the lower courts' prior cases—it departs from the statute, and therefore the law, itself.

Justice Hudson recognized the departure and did not agree.[130] Instead, she argued that the de novo hearing retains fully its judicial character.[131] Unlike the majority, her idea of how to decide the case comports with the Rules of Civil Procedure. Rule 1 of the North Carolina Rules of Civil Procedure states that the "rules shall govern the procedure in the superior

126. *Id.* at 504 (emphasis added).

127. *Id.* at 506 (citing W.H.G. Jr., Note, *The Model Power of Sale Mortgage Foreclosure Act: An Appraisal*, 27 VA. L. REV. 926, 929 (1941)).

128. *Id.* at 505. The court backed up its conclusion by citing section 45-21.16(a), which specifically mentions the Rules and a case discussing a procedure that replaces them. *Id.* (citing N.C. GEN. STAT. § 45-21.16(a); *In re* Ernst & Young, LLP, 684 S.E.2d 151, 156 (N.C. 2009)).

129. *See id.*; *see also In re* Herndon, 781 S.E.2d 524, 528–29 (N.C. Ct. App. 2016); *In re* Rogers Townsend & Thomas, PC, 773 S.E.2d 101, 103 (N.C. Ct. App. 2015); Lifestore Bank v. Mingo Tribal Pres. Trust, 763 S.E.2d 6, 9 (N.C. Ct. App. 2014). Instead of addressing these, the court said generally, "To the extent that prior case law implies [that the Rules of Civil Procedure and traditional doctrines of claim preclusion and collateral estoppel apply to foreclosures by power of sale], such cases are hereby overruled." *Lucks*, 794 S.E.2d at 507.

130. *Lucks*, 794 S.E.2d at 507 (Hudson, J., concurring in result).

131. *See id.*

and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute."[132] The de novo hearing takes place in the superior court, which places it directly within the scope of Rule 1. Furthermore, a trial judge decides the foreclosure at this stage, not just a clerk of court.[133] No statute for the de novo hearing "prescribe[s]" a "differing procedure" as Rule 1 requires before courts may decline to follow the Rules of Civil Procedure.[134]

The statute discussing foreclosures by power of sale offers specific guidelines for the initial hearing before the clerk of court, sufficiently displacing the default Rules of Civil Procedure; however, the statute offers little to no guidance for the de novo hearing.[135] For these reasons, the de novo hearing is an "action[] [or] proceeding[] of a civil nature" that occurs "in the superior [or] district courts of the State of North Carolina" and no "differing procedure is prescribed by statute."[136] The de novo hearing thus fits precisely within the scope of Rule 1.

Justice Hudson's analysis comes much closer to the way courts traditionally interpreted the role of the clerk of court in foreclosures by power of sale and more closely approximates the way the law was intended to work. Even if the court maintained the same position on the hearing before the clerk of court, it should have followed Justice Hudson's approach to the de novo hearing. If it had done so, the case would be in line with the way the law was intended to operate.

C. *Implications*

The *Lucks* decision did have a positive implication in that it furthered one of the principle goals of the Rules of Civil Procedure: liberal construction. However, other, more important goals would have been furthered by the court adopting Justice Hudson's approach. Though the decision attempted to solve unresolved issues and seemed to comport with at least the liberal construction policy behind the Rules of Civil Procedure, its application proves troubling in: (1) how it interacts (or fails to interact)

132. 1 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 1 (3d ed. 2007).

133. *See* N.C. GEN. STAT. § 45-21.16(d1) (2017) ("The act of the clerk in so finding or refusing to find is a judicial act and may be appealed *to the judge of the district or superior court* having jurisdiction . . . .") (emphasis added).

134. *Lucks*, 794 S.E.2d at 507–08; 1 WILSON, *supra* note 132; *see* N.C. GEN. STAT. § 45-21.16 (2017).

135. *See* N.C. GEN. STAT. § 45-21.16 (regarding the process of appeal for a de novo hearing before the court, all of the statute's guidance operates to tell the parties, not the superior court, how to proceed).

136. 1 WILSON, *supra* note 132.

with the General Statutes of North Carolina; and (2) the general confusion it creates on the issue of foreclosures by power of sale.

The Rules of Civil Procedure, codified in chapter one of the North Carolina General Statutes, seek to ensure that "cases [are] disposed of on the merits and not on the basis of procedural errors."[137] For this reason, the Rules are meant to be "liberally construed."[138] The majority opinion closely comports with this underlying goal of the Rules of Civil Procedure. By holding that claim preclusion does not apply to foreclosures by power of sale, the majority opinion makes it more likely that these actions will be decided on the merits rather than on a technicality—whether the lender has attempted to bring exactly the same claim in the past. However, the policy behind the doctrine of claim preclusion plays an even more important role that vastly outweighs the policy of deciding cases on the merits. While the Rules seek to escape overly technical results, claim preclusion seeks to shelter parties from taking advantage of the system and prevent courts from reaching inconsistent results in the same case.[139]

In this context, the policy interests promoted by claim preclusion far outweigh the one advanced by the Rules of Civil Procedure. An overly technical result in these circumstances would be that a lender had brought a case twice, but either failed to comply with the rules of bringing a foreclosure by power of sale or discovered on its own that it did not prepare for the foreclosure. Either way, the lender would find that after two tries, it could not attempt another foreclosure. In that case, the party at fault for the barred action would bear the consequences. On the other hand, if the court did not apply the doctrine of claim preclusion, the borrower and the courts would have to deal with the consequences of the lender's mistake (or worse—the lender's wrongdoing). In this way, the policy behind claim preclusion outweighs that of the Rules of Civil Procedure themselves.

Perhaps the most concerning implication of the decision in *Lucks* occurs in its relationship to the General Statutes of North Carolina. North Carolina General Statutes section 45-21.16(d1) makes clear the legislative intent behind foreclosure by power of sale hearings.[140] It explicitly identifies that "[t]he act of the clerk in . . . finding or refusing to . . . find [the existence of the required elements to bring a foreclosure by power of sale] is a judicial act."[141] The United States Bankruptcy Court for the Eastern District of North

137. 1 WILSON, *supra* note 132, at § 1-2.

138. *Id.*

139. *See* 2 WILSON, *supra* note 58, at § 88-1 ("The doctrine of [claim preclusion] is designed to protect parties from the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation.").

140. N.C. GEN. STAT. § 45-21.16(d1) (2017).

141. *Id.*

Carolina identifies the problem as follows: "[I]n applying North Carolina law after *Lucks*, the court is faced with the dilemma of a state supreme court decision containing language that directly conflicts with a state statute."[142] The lower courts must follow the state supreme court; however, in so doing, they fail to follow the legislative authority.

This contradiction to the state statutes, along with other aspects of *Lucks*, contribute to the vast confusion left in the wake of the case. As identified by Justice Hudson, the court failed to specify whether the Rules of Civil Procedure no longer apply to the hearing before the clerk of court alone or whether they also no longer apply to the de novo hearing in the superior court.[143] Instead of explaining how and why the prior North Carolina case law did not come to the correct conclusions, the majority offers an incomplete, conflicting conclusion. This leaves courts with no guidance about how to apply the case. Since courts do not know why the majority decided the issue the way it did, they cannot tell exactly how the rationale of *Lucks* applies to future cases.[144] Because the majority opinion conflicts with state statute, courts, like *Burgess*, may find that the ruling applies only in the narrow circumstances of the particular case. When courts do this, the same issues surrounding foreclosures by power of sale before *Lucks* still exist after *Lucks*. In this way, the issues the court endeavored to resolve in *Lucks* have not been resolved; instead, they have been exacerbated and multiplied.

IV. SOLVING THE PROBLEM

While Justice Hudson's concurrence would have been the better option in *Lucks*, it would not have been the best option. The best option is still available to North Carolina: to fix the issue through legislation. Though section 45-21.16 solved the Due Process issue, it left confusion in its wake. The legislature needs to clarify the statute and define "judicial act," deciding definitively the issue of whether foreclosures by power of sale are subject to claim preclusion and the other Rules of Civil Procedure.

A couple different effective ways to clarify the issue exist. The legislature could simply add a sentence to section 45-21.16(d1). After saying, "The act of the clerk in so finding or refusing to so find is a judicial

142. Burgess v. CitiMortgage, Inc. (*In re* Burgess), 575 B.R. 330, 339 (Bankr. E.D.N.C. 2017).

143. *In re* Lucks, 794 S.E.2d 501, 507 (N.C. 2016) (Hudson, J., concurring in the result).

144. *See Burgess*, 575 B.R. at 343 (holding that *Lucks* did not control the case because "*Lucks* allowed a creditor to seek a new foreclosure order on a different default, as distinct from seeking review of an order *on the same facts* (which presumably would still be barred by [claim preclusion] or collateral estoppel)").

act,"[145] the legislature could add language discussing exactly what that means and whether or not the Rules apply. A new subsection, perhaps a (d2), could be added to discuss the issue. Alternatively, the legislature could pass an entirely new statute stating that the Rules and claim preclusion doctrines apply to foreclosures by power of sale. If the legislature would clarify the statute, courts would have a much more secure indication of the law and how to apply it. Courts would no longer be stuck choosing between the statute's apparent intent and the North Carolina Supreme Court's seemingly contradictory interpretation. Lenders would no longer be able to take advantage of the system and get multiple bites at the proverbial apple.

CONCLUSION

Foreclosures under power of sale remain the chosen path for most lenders.[146] For this reason, it is crucial that either the North Carolina Supreme Court correct the mistake it made in *In re Lucks* by adopting the view taken by Justice Hudson's concurrence or, better, that the legislature step in and correct the problem itself. The majority opinion contradicts the General Statutes of North Carolina and leaves confusion in its wake. Lower courts need better guidance, and the law needs to be settled. If the court or legislature clarifies that the Rules of Civil Procedure and claim preclusion *do* apply to foreclosures by power of sale, lenders will no longer be able to exploit the system. The aforementioned Wife and Husband can keep making payments on their house without fearing that it will be taken from them as a result of a mistake they might have made years ago.

Madison Vance[*]

145. N.C. GEN. STAT. § 45-21.16(d1).

146. *See* 4 N.C. BAR ASS'N FOUND., *supra* note 12, and accompanying text.

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