THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-In-Equity

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Case No. 2010-CP-23-3860

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Independence National Bank,..... Petitioner,

v.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis,..... Respondents.

Appellate Case No. 2013-000915

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# PETITION FOR WRIT OF CERTIORARI

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## Certification of Counsel

The undersigned hereby certifies that Independence Bank filed a petition for rehearing with the Court of Appeals and the Court of Appeals ruled on the petition with finality on April 18, 2013. (App. 242.)

## Questions Presented for Review

I. Did the Court of Appeals err in concluding that Independence Bank was not entitled to reformation with respect to this real estate transaction based upon the conclusion that DeCarlis was not a party to the mortgage contract?

II. Did the Court of Appeals err in concluding that Independence Bank was not entitled to equitable subrogation because it had actual notice of the prior mortgage in favor of DeCarlis through the closing attorney?

## Statement of the Case

Pursuant to Rule 242 of the South Carolina Rules of Appellate Procedure, Independence National Bank seeks certiorari regarding the Court of Appeals' decision in *Independence National Bank v. Buncombe Professional Park, LLC and DeCarlis*, Op. No. 5090 (S.C. Ct. App. filed February 20, 2013) (Shearouse Adv. Sh. No. 8 at 74) ("Opinion") (App. 225.) The issues concerning this petition arise out of a mortgage transaction secured by real property and backed by a personal guaranty. The Court of Appeals' Opinion is inconsistent with several prior decisions of this Court on both questions presented for review.

Petitioner Independence National Bank ("Independence") loaned Respondent Buncombe Professional Park, LLC ("Buncombe") $1,650,000 pursuant to a business loan agreement. The business loan agreement and promissory note were secured by a

mortgage on 4.68 acres of land in Greenville County. (App. 71; 76; 140.) Respondent David DeCarlis ("DeCarlis") is a member of the Buncombe LLC. DeCarlis also personally guaranteed Buncombe's loan obligation. (App. 83.) DeCarlis and Buncombe are sometimes referred to herein collectively as Respondents.

The transaction at issue is comprised of five documents which represent the entire transaction between Independence and Respondents. These documents include: 1) the mortgage contract executed on September 25, 2007 (App. 76); 2) the commercial promissory note executed on September 25, 2007 (App. 71); 3) the loan commitment letter dated September 11, 2007 but executed on September 25, 2007 (App. 66); 4) the business loan agreement executed on September 25, 2007 (App. 140); and 5) the guaranty executed on September 25, 2007 (App. 83). DeCarlis signed the mortgage on behalf of Buncombe. (App. 76.) DeCarlis signed the commercial promissory note on behalf of Buncombe. (App. 71.) DeCarlis signed the loan commitment letter on behalf of Buncombe and DeCarlis also signed the letter individually as guarantor. (App. 66.) DeCarlis signed the business loan agreement on behalf of Buncombe and DeCarlis also signed the business loan agreement individually as guarantor. (App. 140.) DeCarlis then signed the guaranty individually. (App. 83.) Thus, DeCarlis signed all five of the requisite documents and three of those documents were signed by him in his individual capacity. All five of the documents comprised the transaction between Independence and Respondents by virtue of the "Related Documents" provisions in the business loan agreement and in the mortgage contract as detailed further herein. (App. 76; 140; 143.)

The plot of land securing the mortgage was previously encumbered by two mortgages. (App. 156; 162.) One was in favor of First National Bank of Spartanburg

securing a $1,457,149.94 loan (App. 156), and a second in favor of DeCarlis which purports to secure a $570,000 personal loan from DeCarlis to Buncombe. (App. 162.) This second prior mortgage to DeCarlis is the mortgage that the Court of Appeals determined to have priority over Independence's mortgage.

The Independence loan to Buncombe was intended to fully satisfy the first mortgage obligation to National Bank of Spartanburg. Then, as detailed herein and demonstrated by the loan documents, the Independence loan was intended to have priority lien status given the commitment by Buncombe and DeCarlis. (App. 66.)

Due to the acts or omissions of the closing attorney (Tommy Dugas), however, a subordination agreement, giving Independence priority over the DeCarlis second mortgage as provided for in the loan documents, was not executed at the closing of the loan. (App. 126.) Independence was unaware that the subordination agreement was not executed at the time of the closing. The title work done on behalf of Dugas revealed the prior mortgage in favor of DeCarlis but Dugas—the admitted "dual" agent for both Independence and Buncombe/DeCarlis—failed to inform Independence of the existence of the Decarlis mortgage and failed to have the subordination agreement executed. (App. 134.) The subordination agreement should have been executed and would have been consistent with the applicable provisions of the transaction documentation. (App. 66, 140.)

DeCarlis also did not make Independence aware of the prior second mortgage prior to closing. (App. 140.) Because of the failure of the closing attorney to obtain the subordination agreement and the failure of the closing attorney and DeCarlis to inform Independence of the existence of the prior second mortgage and that it had not been

subordinated, the Independence mortgage was improperly recorded as second in priority to the DeCarlis mortgage. Almost three years after the transaction, however, and once Buncombe and DeCarlis defaulted on their loan obligations, the closing attorney attempted to correct his mistake by trying to obtain a subordination agreement from DeCarlis. (App. 158.) This is the first time Independence was made aware that its mortgage did not have first priority. DeCarlis refused to execute the subordination agreement, claiming he had no independent recollection he was to subordinate his prior mortgage. (App. 158-159.)

As argued to the Master-in-Equity, to the Court of Appeals, and briefed herein, while Independence did not have the executed subordination agreement in hand at any time, several pertinent documents to the transaction reveal an intent by both Buncombe and DeCarlis to provide Independence with priority of its mortgage. Significantly, DeCarlis did not appear at the foreclosure proceeding before the Master-in-Equity. (App. 7-8.) Thus, the only record evidence before the Master and the Court of Appeals was proffered by Independence through the closing attorney Tommy Dugas, Independence's loan officer, Robert M. Lowery, and Independence's vice president Fred Moore. (App. 7; 110-133.) Respondents offered no testimony as to DeCarlis's intent with respect to this transaction or on the validity of the DeCarlis prior mortgage.

As recognized by the Court of Appeals, Buncombe and DeCarlis entered into a loan commitment letter with Independence. (App. 66.) As part of the loan commitment letter, Buncombe and DeCarlis committed to providing Independence with a first priority mortgage secured by the subject property (the 4.68 acre tract). (*Id.*) Specifically, the loan commitment letter provided: "[t]he Borrower [Buncombe] shall grant Independence

a title insured ***first real estate mortgage in the Property*** including all improvements presently located or subsequently constructed thereon." (App. 67) (emphasis added). The loan commitment letter also made the first lien status a precondition to the loan transaction. (App. 68.)

DeCarlis and Buncombe also executed a business loan agreement with Independence. (App. 140.) In the business loan agreement, Respondents warranted and represented that they "have good title to all of Obligors' assets. All encumbrances on any part of the Property were disclosed [by Buncombe and DeCarlis] to Lender [Independence] in writing." (App. 140.) DeCarlis, however, did not disclose the prior mortgage to Independence in writing or otherwise.

Finally, the business loan agreement signed by DeCarlis individually and the mortgage contract contained "Related Documents" provisions making every agreement arising in connection with the mortgage transaction part of the business loan agreement and the mortgage contract by specific reference and incorporation. The "Related Documents" provision of the mortgage contract incorporated the promissory note, the loan commitment letter, the business loan agreement, and the guaranty into the business loan agreement and the mortgage. (App. 76.) The business loan agreement also contained a similar provision identified by the clause "Integration and Amendment." (App. 143.)

Despite consideration and acknowledgement of the terms of the above-cited documents and provisions, the Court of Appeals reversed the Master-in-Equity's order providing Independence with first mortgage status. Before the Master-in-Equity, in its amended foreclosure complaint, Independence sought equitable subrogation in order to

have the rights of DeCarlis and his prior mortgage subordinated to those of Independence due to the failure of the closing attorney and DeCarlis to have a subordination agreement executed. (App. 61-64.) In the alternative, Independence sought reformation of the mortgage contract to make it a first priority lienholder over and above the DeCarlis mortgage. (*Id.*) Buncombe and DeCarlis filed affirmative defenses and counterclaims in response but the Master found that Buncombe and DeCarlis waived those counterclaims by failing to personally appear and present any evidence at the foreclosure trial.[1] (App. 7-8.)

The Master-in-Equity granted relief in favor of Independence Bank on all grounds contained in its amended foreclosure complaint. The Master-in-Equity's rulings are contained in two separate orders. The first order of the Master addressed only the issue of reformation. (App. 4-13.) In his first order, the Master-in-Equity ordered that the Buncombe mortgage with Independence and the DeCarlis mortgage with Buncombe would be reformed in order to provide Independence with a first priority lien. (App. 7-8.) Based on this conclusion of law, the Master ordered foreclosure relief in favor of Independence and held that DeCarlis was personally liable for any deficiency balance remaining on the loan with Independence as guarantor. (App. 9.) Subsequently, both Independence and Respondents moved the Master-in-Equity to alter or amend his Order granting foreclosure in favor of Independence. (App. 96 [Independence motion to alter or amend]; App. 98 [Respondents' motion to reconsider].) Independence moved to alter

[1] The Master-in-Equity's first order makes several references to the Defendants failing to appear. (App. 7-8.) This reference would appear to be directed personally at DeCarlis not appearing at the foreclosure proceeding to testify on behalf of Buncombe or for himself because the transcript and first Order reveal that Mary Leigh Arnold appeared as counsel of record for Buncombe and DeCarlis at the proceeding. (App. 4; 170.)

or amend the Order to address the Master's failure to specifically rule upon its alternative request for relief under equitable subrogation. (App. 96.) Respondents also moved to reconsider, arguing: 1) the Master should not have permitted Independence to amend its complaint to add a cause of action for reformation, 2) the trial court failed to give DeCarlis' mortgage priority status, and 3) reformation was not an appropriate remedy. (App. 98-99.)

In his second order, the Master-in-Equity granted Independence's motion to alter or amend and denied Defendants' motion. (App. 14-16.) In doing so, the Master amended his prior order to provide that Independence was also entitled to equitable subrogation. (*Id.*) The Record does not include any filing by Respondents in opposition to Independence's motion to alter or amend as to equitable subrogation nor does the Record contain any filing or argument raising specific grounds as to why Independence should not be entitled to relief via its claim for equitable subrogation. Further, Respondents did not file a subsequent motion for reconsideration to challenge the Master-in-Equity's second order outlining his ruling with respect to equitable subrogation. The ruling on the equitable subrogation issue was not covered by the Master's first order thereby making his second order the first time the court ruled upon the issue and Buncombe nor DeCarlis never made a substantive challenge after the foreclosure trial regarding this ground for relief.

Respondents appealed from the Master-in-Equity's Orders in favor of Independence. The Court of Appeals reversed the Master-in-Equity with respect to both reformation and equitable subrogation. (App. 225-233.) The Court of Appeals concluded that Independence was not entitled to priority. (*Id.*) First, the Court of

Appeals held that DeCarlis was not a party to the mortgage contract between Buncombe and Independence and, therefore, the trial court erred in reforming the mortgage as the law does not permit a court to rewrite contracts to add a new party. (App. 230.) While ruling against Independence the Court of Appeals nevertheless noted that "it appears from the record [DeCarlis] was aware Independence expected a first mortgage . . ." (App. 231.) Second, the Court of Appeals opined that Independence was not entitled to equitable subrogation because, through its agent (the closing attorney who was the dual agent for both sides of the transaction), Independence had actual notice of the prior mortgage in favor of DeCarlis. (App. 232.) The Court reasoned that because the closing attorney acted as the agent of both parties and knew of the prior mortgage before closing, Independence was imputed with actual knowledge of the prior mortgage in favor of DeCarlis, thereby preventing relief in the form of equitable subrogation. (*Id.*)

Independence petitioned the Court of Appeals for rehearing. (App. 234-241.) The Court of Appeals denied the request for rehearing. (App. 242.) This petition for writ of certiorari followed.

**Summary of Arguments in Support of Petition for Writ of Certiorari**

Certiorari is warranted because the Court of Appeals overlooked several decisions from this Court in its Opinion reversing the Master-in-Equity. The Court of Appeals' Opinion must be reversed in order to properly set forth the law of this State as it currently exists under the prior decisions of this Court.

First, the Court of Appeals incorrectly concluded that reformation was not available to Independence Bank as a means for obtaining a first priority mortgage. The Court of Appeals acknowledged the existence of each document making up the entire

transaction between the parties. (App. 225-231.) The Court of Appeals, however, erred in concluding it could not reform the transaction to provide as if the subordination agreement had been executed to give first priority status to Independence. DeCarlis was a party to this transaction since the mortgage contract and business loan agreement DeCarlis signed (individually and in his capacity as a member of Buncombe) specifically incorporated related documents in this transaction into the mortgage, thereby empowering the courts to reform the real estate transaction as if the subordination agreement had been executed. Hence, the Court would not have rewritten the contract had it affirmed the lower court. The Court of Appeals' opinion is contrary to a plethora of authority from this Court holding that: 1) contracts can be made up of several documents executed at one time which constitute a single transaction, and 2) that a court must consider the entire contract as a whole, not isolated parts. Moreover, reformation is appropriate in this instance because DeCarlis failed to disclose the existence of the prior mortgage (in his favor) in obtaining the loan from Independence, as he agreed to do in the business loan agreement. The Court of Appeals' decision thus runs contrary to decisions of this Court allowing for reformation of contracts when material facts are not provided or omitted.

Second, the Court of Appeals should have ruled that the issue of equitable subrogation was not properly preserved for appellate review. The grounds argued by Respondents on appeal were not presented or ruled upon by the Master-in-Equity. Moreover, the Court of Appeals only imputed a portion of the closing attorney's knowledge concerning this transaction to Independence. The Court of Appeals focused only on the closing attorney's knowledge of the existence of the prior mortgage in favor

of DeCarlis. The Court of Appeals did not, however, recognize that the closing attorney also knew and testified that Independence's mortgage was intended to have first priority status, which knowledge should also have been imputed to Buncombe and DeCarlis. Thus, the Court of Appeals did not properly apply the elements of equitable subrogation to the facts in this case.

Certiorari is warranted in this matter. The Court of Appeals' Opinion departs from equity and contract principles as announced by this Court and thus will create confusion in the bench and bar.

## Concise Arguments in Support of the Petition for Writ of Certiorari

### I. The Court of Appeals erred in concluding that Independence Bank was not entitled to reformation based upon the conclusion that DeCarlis was not a party to the mortgage contract and DeCarlis failed to disclose the existence of the prior mortgage.

#### A. DeCarlis was a party to the transaction and the Court of Appeals would not have had to rewrite a contract to add a new party in order to affirm the Master-in-Equity's decision reforming the contract to provide Independence Bank with a first priority lien.

DeCarlis was individually a party to this transaction. On September 25, 2007, DeCarlis individually signed the loan commitment letter and the business loan agreement, and signed the mortgage on behalf of Buncombe. Through the "related documents" provision of the business loan agreement, the mortgage and the loan commitment letter were integrated into the business loan agreement signed by DeCarlis individually. (App. 143.) Likewise, through the "Related Documents" provision of the mortgage contract, the loan commitment letter and business loan agreement were incorporated into the mortgage. (App. 76.) Thus, DeCarlis is a party to the mortgage contract. Hence, the

Court of Appeals overlooked long-standing decisions from this Court that require our courts to read a contract in whole rather than isolating selected provisions.

It has long been established "that one contract may be made a part of another by reference to it." *Twiggs v. Williams*, 98 S.C. 431, 456, 82 S.E. 676, 679 (1914). Moreover, in the context of a real estate transaction, where a mortgage seeks to incorporate by reference other documents, all instruments are ordinarily construed together. *Rhodus v. Goins*, 129 S.C. 40, 41-42, 123 S.E. 645, 646 (1924); *see also* C.J.S. Mortgages Section 156 (1949). Thus, when contractual documents cross-reference and incorporate other documents or contracts, the related and cross-referenced materials are considered together and ***constitute one transaction***. *Mack Manuf. Co. v. Mass Bonding & Ins. Co.*, 103 S.C. 55, 68, 87 S.E. 439, 442 (1915) (emphasis added).

Based on these principles, in the context of real estate transactions, this Court has held that "[t]he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together." *Klutts Resort Realty, Inc. v. Down-'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). "The theory is that the instruments are effectively one instrument or contract." *Id.* "Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated." *Id.* at 88-89, 232 S.E.2d at 24.

Buncombe and DeCarlis executed a loan commitment letter and business loan agreement with Independence on September 25, 2007. (App. 66; 140.) The Court of Appeals recognized the existence of the commitment letter and the business loan agreement. (App. 225-231.) Buncombe and DeCarlis did not dispute their existence at foreclosure. (App. 7-8.) The Court of Appeals noted that DeCarlis knew Independence expected a first mortgage. (App. 231.) Through the loan commitment letter, Buncombe and DeCarlis (individually) committed to providing Independence with a first priority mortgage secured by the subject property. (App. 67.) Through the business loan agreement, Buncombe and DeCarlis (individually) warranted they disclosed all encumbrances on the property securing the loan. (App. 141.) The loan commitment letter expressly provided: "[t]he Borrower [Buncombe] shall grant Independence a title insured ***first real estate mortgage in the Property*** including all improvements presently located or subsequently constructed thereon." (App. 67) (emphasis added). The loan commitment letter also made the first lien status a precondition to the loan transaction:

> A commitment to issue a standard ALTA mortgage title insurance policy in form, content and from a title insurer satisfactory to Independence, insuring the mortgage as a first lien on the Property for the full amount of the loan, with such endorsements as Independence may require. Title shall be fee simple and marketable, free and clear of all defects, liens and encumbrances, including mechanics' liens.

(App. 68.)

This loan commitment letter and the business loan agreement, both signed by DeCarlis individually, were made a part of the mortgage contract through the mortgage and the business loan agreement's "Related Documents" clauses. The "Related Documents" provisions in both the mortgage contract and the business loan agreement

incorporated the promissory note, the loan commitment letter, the business loan agreement, and the guaranty into the mortgage to be read as a whole making DeCarlis a party to the transaction. (App. 143; 76.) The "Related Documents" provision in the mortgage stated:

> The words "Related Documents" mean ***all promissory notes, security agreements, prior mortgages, prior deeds of trust, business loan agreements, construction loan agreements, resolutions, guaranties, environmental agreements, subordination agreements, assignments of leases and rents and any other documents or agreements executed in connection with this Security Instrument*** whether now or hereafter existing. The Related Documents are hereby made part of this Security Instrument by reference thereto, with the same force and effect as if fully set forth herein.

(App. 76) (emphasis added). Similarly, the business loan agreement contained the following clause:

> This Agreement and other written agreements among the Parties [Buncombe and DeCarlis and Independence], including but not limited to the Related Documents, are the entire agreement of the Parties and will be interpreted as a group, one with the others. None of the Parties will be bound by anything not expressed in writing, and this Agreement cannot be modified except by a writing executed by those Parties burdened by the modification.

(App. 143.)

DeCarlis did not appear at the foreclosure hearing. (App. 7-8.) The only testimony adduced at the hearing was offered by Independence. Tommy Dugas, the closing attorney, testified that DeCarlis committed to providing Independence with a first priority mortgage. (App. 116-130.) Frank M. Lowery, a loan officer at Independence similarly testified that the bank was to have first mortgage. (App. 110-115.) Fred Moore, vice president at Independence, also testified that the bank would not have made the loan secured only by a second mortgage. (App. 131-133.) Thus, but for the

commitment by DeCarlis to provide a priority mortgage and the omission by DeCarlis to disclose the prior encumbrance, Independence would not have funded this loan.

As noted herein, the Court of Appeals also held that DeCarlis knew Independence expected a first mortgage. (App. 231.) But despite this ruling, the testimony from Dugas, Lowery and Moore, and the existence of the contractual obligations which Respondents did not challenge with any evidence at the foreclosure proceeding, the Court of Appeals concluded:

> In the present case, the error was failing to have DeCarlis sign a subrogation agreement. DeCarlis was not a party to the mortgage and reformation does not permit a court to write a new, additional party into the mortgage to correct the error.

(App. 230) (internal citations omitted). In reaching this conclusion, the Court of Appeals failed to adhere to the rules governing contract construction applied in real estate transactions. In *Klutts*, this Court read a contract and promissory note together to hold that the individual parties were personally liable for the debt they had guaranteed. *Klutts*, 268 S.C. at 86-87, 232 S.E.2d at 23. While the note in *Klutts* did not contain the same language respecting the personal guarantee as was contained in the "basic" contract, the Court read the documents together to conclude that the individuals were personally liable. *Id.* at 88-89, 232 S.E.2d at 24. The Court affirmed the order granting specific performance of the contract. *Id.*

Here, the five documents executed on September 25, 2007 constitute the agreement between the parties. This is a single transaction under the law of this State. *Klutts, supra.* DeCarlis is a party to this transaction and the mortgage contract by virtue of the requirement that all documents executed at the same time must be read as a whole. The Court of Appeals isolated the mortgage contract and opined it would have to be

rewritten. This conclusion is incorrect. DeCarlis was a party to the loan commitment letter and the business loan agreement. The loan commitment letter and business loan agreement were part of the mortgage contract. All relevant documents constituting the transaction were executed on September 25, 2007. Reading them together and properly applying the law of this State as provided by this Court, the transaction should have been reformed as if the subordination agreement had been executed in order to provide Independence with first priority over the prior DeCarlis mortgage. DeCarlis should be required to live up to his commitment.[2] *See Taylor v. Highland Park Corp.*, 210 S.C. 254, 260-61, 42 S.E.2d 335, 337-38 (1947) (noting that "[i]t has been held that the reformation of a contract and its enforcement as reformed constitute but one cause of action."). Moreover, here, the mistake of the closing attorney, which is the mutual mistake of both sides to this transaction, permits the Court to reform the contract to conform to the intent of the parties to this transaction. *See Shaw v. Aetna Cas & Surety Ins. Co.*, 274 S.C. 281, 285, 262 S.E.2d 903, 905 (1980) (holding that our courts will reform written contracts to conform to the intent of the parties when a mutual mistake exists in a transaction preventing performance of the obligation as intended).

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[2] Respondents also essentially agreed to reformation in the business loan agreement. The business loan agreement contains a provision entitled "Confirmatory Documents and Actions" stating "Borrower agrees that on Lenders' request, Borrower will do any act or execute any additional documents that are or may be required to make the terms of the Loan conform to the conditions contained in the Lenders' commitment to Borrower. Within five days of Lender's request, Borrower will furnish an estoppel certification in a form Lender approves." (App. 141.) DeCarlis and Buncombe failed to abide by this provision in refusing to sign the subordination agreement later supplied by the closing attorney. This refusal resulted in Independence having to seek relief from the courts. This Court, however, can utilize this provision as further support for the conclusion that reformation can be had in this transaction and is warranted under these facts and the law as properly applied.

### B. DeCarlis failed to disclose the prior mortgage to Independence Bank and it is entitled to reformation as a result of this omission.

In addition to failing to apply the prior decisions of this Court regarding the construction of documents in real estate transactions, the Court of Appeals overlooked other authorities that provide for reformation when one party fails to disclose a material fact. DeCarlis knew about his prior mortgage but failed to inform Independence of its existence. "It is the law of this State, and appears to be the universal rule, that reformation of a written instrument may be obtained where there is mistake on the part of the plaintiff, and inequitable conduct, deceit, concealment and imposition of fraud on the part of the defendant, inducing the plaintiff's mistake." *Aiken Petroleum Co. v. Nat'l Petroleum Underwrites,* 207 S.C. 236, 36 S.E.2d 380 (1945) (internal citations omitted).

DeCarlis did not dispute signing the documents making up the entirety of this transaction. (App. 7-8.) Beyond the above-detailed loan commitment letter, DeCarlis also individually executed a business loan agreement. (App. 140.) Through the business loan agreement, DeCarlis and Buncombe warranted and represented that they "have good title to all of Obligors' assets. All encumbrances on any part of the Property were disclosed to Lender [Independence] in writing." (App. 141.) There is no evidence in the record that DeCarlis disclosed the prior mortgage in writing to Independence either individually or through the closing attorney (the dual agent for the parties) at the time of closing. DeCarlis's omission of this material fact provides an additional ground for reviewing the Court of Appeals' decision in this matter. DeCarlis promised to disclose any prior encumbrances on the property before closing. Because he did not, DeCarlis, in equity, is not entitled to profit from his failure to disclose.

## II. The Court of Appeals erred in concluding that Independence Bank was not entitled to equitable subrogation.

### A. Respondents failed to preserve any objection to the Master-in-Equity's rulings on equitable subrogation.

Respondents did not substantively challenge the grounds raised by Independence in its motion to alter or amend the Master-in-Equity's first order to address equitable subrogation. Nor did Respondents file their own second motion to reconsider after the Master's issuance of the amended order in which he ruled, for the first time, that Independence was entitled to equitable subrogation.

It is axiomatic that for an issue to be preserved for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). Further, in order for an appellate court to rule upon an issue, the record must contain some evidence or documentation that the issue was raised to the lower court. *See Coggeshall v. Reprod. Endocrine Assocs.*, 376 S.C. 12, 655 S.E.2d 476 (2007) (noting that while the briefing referred to a motion to amend which might have raised an issue, the record did not contain the motion and it could not be concluded that the trial court considered the issue purportedly raised by the motion based on the trial court's order summarily denying the motion to amend); *Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001*, 322 S.C. 127, 132, 470 S.E.2d 373, 376 (1996) (holding "[t]he appellant has the burden of providing this court with a sufficient record upon which to make a decision.").

Here, the Master-in-Equity issued an order on May 12, 2011 granting Independence the right to foreclose and reforming the contract to provide the bank with a

first lien on the property. (App. 4-13.) The Master's first order did not address the bank's request for equitable subrogation. (*Id.*) Subsequently, Independence moved the Master to alter or amend his order to specifically rule upon its request for equitable subrogation. (App. 96.) At the same time, Respondents moved the Master to alter or amend his order reforming the contract. (App. 98.) The Master granted Independence's motion to alter or amend and denied Respondents' motion. (App. 14-16.) Absent from the Record, however, is any argument or grounds offered by Respondents as to why the trial court should not alter or amend the first order to address and grant equitable subrogation.[3]

Accordingly, Respondents' failure to show that they raised any argument to the Master-in-Equity regarding equitable subrogation bars the Court of Appeals from using Respondents' newly raised arguments on appeal as a basis for reversal. Further, the Master relied upon equitable subrogation as an additional basis for his conclusion that Independence was entitled to foreclosure in his amended order. The Respondents did not provide the Court of Appeals with any record of their having opposed Independence's motion to alter or amend on this ground or any record of their challenging the Court's ruling on equitable subrogation in his amended order. Hence, it was error for the Court of Appeals to reverse the Maser's ruling on equitable subrogation because Respondents did not preserve the issue.

### B. The Court of Appeals incorrectly imputed only a portion of the knowledge of the closing attorney to Independence and imputed no knowledge through the closing attorney to DeCarlis.

[3] In his second order, the Master noted that "the Defendant has previously fully raised and argued these matters, and the Court has previously had the opportunity to consider them and rule on them." (App. 15.) The Record contains no such arguments and the Master had not previously ruled on the issue of equitable subrogation, however.

Should the Court deem Respondents' arguments on equitable subrogation to be preserved, the Court should still review and reverse the Court of Appeals' conclusion as to equitable subrogation. The Court of Appeals held that Independence met every element of its cause of action for equitable subrogation save one—actual knowledge of the prior mortgage. (App. 230-232.) The Court of Appeals concluded that because the closing attorney was the dual agent for both parties, Independence was imputed with actual knowledge of DeCarlis's prior mortgage.[4] (App. 232.) The Court of Appeals' Opinion in this regard does not properly address the imputation of the dual agent's full knowledge and its effect on DeCarlis.

**1. All knowledge must be imputed, not selected portions.**

When addressing the imputation of knowledge to a principal through an agent, the Court must impute all the agent's knowledge, not just a portion of it. *Bank of Johnsonville v. Sovereign Camp, W. O. W.*, 130 S.C. 444, __, 126 S.E. 332, 335 (1925) (holding that "[t]he duty of an agent to inform his principal of all material facts is a duty which the ***law conclusively presumes that the agent has performed, and a principal is therefore affected with knowledge of all material facts of which the agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority***. . .") (emphasis added) (internal citations omitted).

[4] The Court of Appeals held that the knowledge through an agent is actual knowledge. The cases from this Court, however, consistently refer to knowledge imputed through an agent as "***constructive***" knowledge. *See Columbia Ice Co. of Columbia v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979) (stating that "[i]t is well established that a principal is affected with *constructive knowledge* of all material facts of which his agent receives notice while acting within the scope of his authority.") (emphasis added). Certiorari should thus be granted to clarify the effect of constructive knowledge of a prior mortgage with respect to equitable subrogation.

The closing attorney testified that he was the agent for all parties to this transaction and he knew of the existence of the prior DeCarlis mortgage. (App. 125-128.) The closing attorney, however, did not inform Independence of the prior mortgage. (App. 126-127.) This knowledge, however, is not the entirety of the facts known to DeCarlis or the closing attorney. The closing attorney, Tommy Dugas, testified that he knew Independence was intended to have a first mortgage. (App. 120; 126-127.) Dugas in fact tried to get the subordination agreement signed by DeCarlis three years after closing because he knew Independence was to be the first lienholder. (App. 125-128.) But for the closing attorney's failure to obtain the subordination agreement from DeCarlis, Independence would have been first in priority. (*Id.*)

The Court of Appeals selectively omitted any mention, when making a determination on the actual knowledge element of equitable subrogation, of the fact that both DeCarlis and Dugas knew Independence was intended to be the first lienholder. The Court of Appeals stopped short on imputation of all knowledge through Dugas. The Court of Appeals did not impute his knowledge that "the agreement between the parties was that Independence National Bank would be a title insured first mortgage, and in order for that to take place the mortgage to First National Bank of Spartanburg needed to be satisfied and the second mortgage to Mr. DeCarlis needed to be satisfied, released, or subordinated." (App. 120.) Respondents did not challenge this testimony on cross-examination at the foreclosure hearing. Moreover, the decisions of this Court do not permit selective imputation as utilized by the Court of Appeals. The law requires imputation of all facts known to the agent. Had the Court of Appeals recognized full imputation, then Independence would have prevailed on equitable subrogation as well.

### 2. The closing attorney was also the agent of DeCarlis and the Court of Appeals failed to impute any knowledge through the closing attorney to DeCarlis.

Equitable subrogation is founded upon the premise that the law should place the parties in the same position they would have been in had the transaction properly closed. *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960) (holding that "[l]egal subrogation is not dependent upon contract. The doctrine is an equitable one, founded not upon any fixed law, but upon principles of natural justice; its purpose is to require the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it; and it is to be applied according to the dictates of equity and good conscience in the light of the actions and relationship of the parties."). The decision of the Court of Appeals reaches an inequitable result and is manifestly unfair.

Here, all the parties knew and their dual agent knew that Independence would have a first mortgage. Despite this, the Court of Appeals found in favor of DeCarlis. The Court of Appeals failed to impute any knowledge regarding this transaction ***to DeCarlis*** through the closing attorney. This Court has previously held that knowledge must be imputed to all parties to a transaction via an agent acting on their behalf.

This Court has recognized that a party is not entitled to an unintended priority when the closing attorney is aware of the intent of the parties but the closing attorney's actions result in incorrect priority positions. *Crystal Ice Co. of Columbia v. First Colonial Corp.*, 273 S.C. 306, 257 S.E.2d 496 (1979). In *Crystal Ice Co.*, the closing attorney closed the transaction and undertook recording the documents with the clerk of court for all parties. *Id.* 273 S.C. at 308, 257 S.E.2d at 497. As here, the attorney thus acted for both sides. The attorney recorded the assignment of a mortgage in favor of

Crystal Ice Company before he recorded the purchase-money security instrument in favor of Mr. Shealy. *Id.* The result put Mr. Shealy second in priority to Crystal Ice Company. *Id.* This was not the intent of the parties as Mr. Shealy was to have the first lien with his purchase-money mortgage. *Id.* at 310, 275 S.E.2d at 498. This Court reversed the trial court's decision giving Crystal Ice Company priority. *Id.* at 308-09, 257 S.E.2d at 497. The Court based its decision to reverse on two grounds: 1) the closing attorney was the agent of Crystal Ice and 2) Mr. Shealy was unaware that he would not have priority. *Id.* at 310, 257 S.E.2d at 498 (stating "[i]t is patently obvious that Shealy's purchase money interest necessarily would be prior to the mortgage assigned to respondent; First Colonial had no interest to mortgage until it acquired the Shealy property, and the deed and the purchase money interest were executed simultaneously.").

In this case, the Court of Appeals failed to arrive at the proper equitable result. First, Independence was not aware that Tommy Dugas, the closing attorney, would not obtain the subordination agreement. The parties' contracts provided for the first priority mortgage in favor of Independence. The bank had every expectation it would be the first lienholder. Hence, the bank was innocent in the failure of Mr. Dugas to obtain the signed subordination agreement and remained unaware of this failure until three years after the closing. Second, Dugas was also the agent of DeCarlis. The Court cannot favor one party in a dual agency setting. The *Crystal Ice Co.* case demonstrates this reality. As this Court wrote:

> [T]here was never an instant when [the intended first lienholder] relinquished a hold on it; and [the first lienholder] would never have parted with it at all except upon the belief and faith that if his buyer defaulted he could either recapture his property or get paid out of it.

*Crystal Ice Co.*, at 311, 257 S.E.2d at 498. Independence Bank offered undisputed testimony of this precise point before the Master-in-Equity. It would have never loaned the money to Buncombe without a first mortgage. (App. 131.) Independence Bank does enter commercial loans as a second lienholder on unconstructed lots. (App. 113-114.) Further, the first mortgage status was a precondition to the loan as the loan commitment letter required:

> the mortgage as a first lien on the Property for the full amount of the loan, with such endorsements as Independence may require. Title shall be fee simple and marketable, free and clear of all defects, liens and encumbrances, including mechanics' liens.

(App. 68.) Without first priority, the transaction would not have occurred. Hence, the Court of Appeals' decision should be reviewed and reversed.

## Conclusion

Based on the above grounds, this Court should grant this petition for writ of certiorari. The decision of the Court of Appeals should be reversed and the Orders of the Master-in-Equity reinstated.

Respectfully submitted,

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Columbia, South Carolina
June 19, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-In-Equity

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Case No. 2010-CP-23-3860

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Independence National Bank,..... Petitioner,

v.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis, ..... Respondents.

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PROOF OF SERVICE

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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioner, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Petition for Writ of Certiorari

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June 19, 2013

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June 19, 2013

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Independence National Bank v. Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis
Civil Action No. 2012-CP-23-3860
SC Court of Appeals No. 2011-196059
Our File No. 28156/01502

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a Petition for Writ of Certiorari in regard to the above- referenced matter. Also enclosed are three copies of the Appendix. We would ask that you file the originals and return clocked-in copies to us via our courier. Also enclosed is our Firm check in the amount of $100.00 as the required filing fee.

Very truly yours,

A. Mattison Bogan

AMB:lpw
Enclosures
cc: The Honorable Jenny Abbott Kitchings (Petition only)
Mary Leigh Arnold, Esquire (Petition only)