

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Perry H. Gravely
The Honorable Robin B. Stilwell
Circuit Court Judges

Appellate Case No. 2022-001724
Court of Appeals Opinion 2022-UP-326
Circuit Court Case No. 2017-CP-23-8016

Wells Fargo Bank, N.A..... Respondent,

v.

Michelle Hodges, Individually; Michelle Hodges, as Personal
Representative of the Estate of Ruth Ladson Witherspoon; Stanley
Witherspoon; SC Housing Corp.; Twin Creeks Homeowners
Association, Inc.,..... Defendants.

of whom

Michelle Hodges, Individually and as the Personal Representative
of the Estate of Ruth Ladson Witherspoon is the..... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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April 6, 2023

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INTRODUCTION

A case must clear a high hurdle in order to merit this Court's attention through a writ of certiorari. It must raise a novel question of law, or conflict with this Court's prior precedent, or involve a substantial constitutional question, or have other "special and important reasons" that warrant Supreme Court involvement. Rule 242(b), SCACR.

This case falls far short of this standard. There is nothing in the Court of Appeals' unanimous, unpublished decision that conflicts with precedent from this Court, or that raises any novel question of law, or that puts any constitutional issue in dispute. Instead, Ms. Hodges bases her appeal on new arguments, one of which she did not present to the circuit court, and the Court of Appeals rightly held that her un-presented arguments were not preserved for appellate consideration. The second she raised for the first time in her petition for re-hearing.

On the merits, Ms. Hodges bases her appeal on her disagreement with the Court of Appeals' decision and her belief that "if Judge Gravely had not have been the judge . . . this case would have had a different outcome"; however, this is not a basis to grant a writ of certiorari. This is hornbook South Carolina law, and it does not warrant extraordinary review by this Court. The petition should be denied accordingly.

COUNTER-STATEMENT OF THE CASE

This is a mortgage foreclosure action that Wells Fargo initiated on December 22, 2017. The Petition for Certiorari argues the Court of Appeals erred in affirming the Circuit Court's order denying Hodges' motion to alter or amend her answer and counterclaims for a seventh time, and also affirming the Circuit Court's order granting summary judgment in favor of Wells Fargo on Hodges' counterclaims and referring the underlying foreclosure to the master-in-equity. As explained below, the Court of Appeals did not err, the circuit court's rulings are correct as a matter of law, and Petitioner should not be permitted to resuscitate defective claims by amending her answer for a seventh time and by generically asking the courts for more discovery.

I. Wells Fargo entered into a mortgage loan with the Petitioner's late mother, on which the Petitioner ceased making payment following her mother's death.

The loan in question was entered into between the Petitioner's mother, Ruth Witherspoon, and NVR Mortgage Finance, Inc., in March 2012. When the loan was established, it was immediately transferred to Wells Fargo, who remains the loan's owner and servicer. (R. pp. 67–72; Promissory Note dated March 28, 2012 endorsed to Wells Fargo.) The Petitioner apparently moved into the property securing the loan in March 2012 as well.

Ms. Witherspoon passed away in July 2015. (R. p. 80; Death Certificate.) Petitioner served as the personal representative of her mother's estate, and in December 2016 received a 50% ownership stake in the subject property via a deed of distribution. (R. pp. 76–78; Deed of Distribution.)

Shortly thereafter, Petitioner applied for a loan modification. (Supp. App. p. 27; Hodges Dep. 45:3–5.) Because she was not the original borrower, Wells Fargo considered Petitioner for a

simultaneous loan assumption and modification. However, in early 2017, she withdrew her request for a loan modification. (Supp. App. p. 28; Hodges Dep. 47:1–4.)

In May 2017, after all payments received by Wells Fargo were applied and credited to the subject loan, the loan was in default and due, and the conditions of the Note and Mortgage were broken. (R. p. 159; Compl. ¶ 12.)

II. Petitioner sought another loan modification, which was denied.

In June 2017, due to the loan’s delinquency, Petitioner re-applied for a simultaneous loan assumption and modification “to try and get help with the mortgage.” (Supp. App. p. 28; Hodges Dep. 47:8–9.) Wells Fargo notified her that she was denied for a modification via letter in September 2017. (Supp. App. pp. 21–23; Denial Letter.) Petitioner appealed the denial, and her appeal was also subsequently denied. (Supp. App. pp. 24–26; Appeal Denial Letter.)

III. Wells Fargo commenced foreclosure, during which the Petitioner attempted to assign tort liability to the bank for its denial of her request for a loan modification.

Wells Fargo filed its Complaint for Foreclosure of Real Estate on December 22, 2017. In response, Petitioner filed a series of answers, amended answers, counterclaims, and amended counterclaims. All told, she filed seven such amended pleadings, the final one of which was filed on July 30, 2018.

In her “Sixth Amended Answer and Counterclaim,” Petitioner asserted the following counterclaims against Wells Fargo: (1) Actual Fraud; (2) Breach of Fiduciary Duty; (3) Intentional Infliction of Emotional Distress; (4) Negligence; (5) Deceptive Business Practices All of Which Occurred; and (6) Fair Debt Collection Prohibited. Petitioner also asserted the following

affirmative defenses: (1) Fraud Upon the Court; (2) Protection from Sale Due to Transfer by Desent (sic); (3) Lack of Standing; (4) Unclean Hands; and (5) Lack of Jurisdiction.

After discovery was completed, Wells Fargo filed a motion for summary judgment on June 10, 2019, as to Petitioner's counterclaims and defenses. On August 7, 2019, the circuit court granted Wells Fargo's Motion for Summary Judgment dismissing Petitioner's counterclaims, striking various defenses, striking the Petitioner's request for jury trial, and referring the matter to the Master-in-Equity. On August 16, 2019, Petitioner filed a second motion to alter or amend.¹ The circuit court denied Petitioner's motion to alter or amend in a Form 4 order, and on September 6, 2019, Petitioner filed her notice of appeal.

The Court of Appeals issued a unanimous *per curiam* opinion on August 17, 2022, affirming the circuit court orders denying her motion to alter or amend her answer and counterclaims for a seventh time, granting Wells Fargo's summary judgment on Ms. Hodges' counterclaims, and referring the underlying foreclosure matter to the master-in-equity. *Wells Fargo Bank, N.A. v. Hodges*, Op. No. 2022-UP-326 (S.C. Ct. App. filed Aug. 17, 2022)

After that court denied Ms. Hodges' petition for rehearing, she filed her petition for a writ of certiorari on January 4, 2023, and her corrected petition for a writ of certiorari on January 18, 2023.

ARGUMENT

I. Ms. Hodges did not preserve her arguments for appellate review.

A. Ms. Hodges waived her arguments regarding survival of the mortgage. (Question Presented I)

¹ Petitioner initially filed a motion to alter or amend on August 5, 2019, prior to the Circuit Court's order granting summary judgment in favor of Wells Fargo.

Through her petition, Ms. Hodges wants this Court to determine whether a mortgage survives the death of a mortgagor and, as a result, negates Wells Fargo’s secured creditor status. (Pet. at 6, 14.; Pet. for Rhrng. at 10–11.) But she failed to ask the Court of Appeals to undertake this same analysis, making the argument for the first time in her Petition for Rehearing, which is fatal to her appeal. Rule 242(d)(2), SCACR (issue must have been raised in initial arguments to Court of Appeals and in the petition for rehearing).

Nor did Ms. Hodges raise this issue to the circuit court. (R. pp. 117–134) And the circuit court did not make any ruling regarding such an affirmative defense. (R. pp. 7–17; Order Granting Wells Fargo’s Motion for Summary Judgment.) Finally, this argument was not included in a Rule 59 motion. (Supp. App. pp. 2–8.)

Accordingly, this issue is not preserved for appellate review. *See, e.g., Summersell v. S.C. Dep’t of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 145–46 (1999) (“[W]here an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review.”). The petition should be denied as a result.

B. Ms. Hodges waived her arguments regarding due process, as the Court of Appeals unanimously held. (Question Presented V)

On appeal, Ms. Hodges argues that the circuit court’s order is void for lack of due process. (Pet. at 14–15.)

The Court of Appeals held that the “record shows no indication this argument was raised to or ruled upon by the circuit court; therefore, it is not properly before this court.” *Wells Fargo Bank, N.A. v. Hodges*, Op. No. 2022-UP-326, 2022 WL 3440355, at *2 (S.C. Ct. App. filed Aug. 17, 2022)

Here, Hodges made this argument for the first time at the Court of Appeals (Ap. Br. at 9–11), and she has not presented any additional evidence to the contrary. Moreover, Ms. Hodges’ statement that “the Circuit court appears to be void for the lack of due process and lack of jurisdiction” is, at best, cursory and conclusory. When an argument is presented without any legitimate explanation or support, it is abandoned. *See Fields v. Monroe Ltd. P’ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (“An issue raised on appeal but not argued in the brief is deemed abandoned.”); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 515 (1994) (stating an issue is abandoned where the Petitioner fails to provide argument or supporting authority); *see also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) (stating that where an issue is “not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal”).

Accordingly, the petition should be denied as a result.

II. Ms. Hodges’ arguments fail on their merits.

Even if the Court disagreed with the issue-preservation points, this case still does not warrant further appellate review because the circuit court’s rulings are fully consistent with the evidence in the record.

A. Wells Fargo, a secured creditor, had standing to bring the Foreclosure action. (Questions Presented I, II, and IV)

On appeal, Ms. Hodges essentially argues Wells Fargo did not have standing to bring the foreclosure action because Wells Fargo is not a secured creditor and Ms. Hodges did not sign the note. (Pet. at 6–9, 13–14.)

In affirming the circuit court’s decision to deny Ms. Hodges’ motion to amend her answer and counterclaims for a seventh time, the Court of Appeals determined that Ms. Hodges’ proposed seventh amended answer regarding standing was analogous to her standing argument in her sixth

amended answer. Nonetheless, the court determined that “the circuit court heard and correctly determined that Wells Fargo had standing because Wells Fargo is in possession of the original promissory note.” *Wells Fargo Bank, N.A. v. Hodges*, Op. No. 2022-UP-326, 2022 WL 3440355, at *1 (S.C. Ct. App. filed Aug. 17, 2022) (citing S.C. Code Ann. § 36-3-301 (Supp. 2021) (“‘Person entitled to enforce’ an instrument means (i) the holder of the instrument”)).

As a threshold matter, Ms. Hodges’ reliance on a 1984 case from Illinois does not present a novel question of law, as the South Carolina Probate Code contemplates secured creditor interests surviving the death of the decedent. *See* S.C. Code Ann. § 62-3-104 (“This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.”); *see also Beach First Nat’l Bank v. Gurnham (In re Estate of Gurnham)*, 407 S.C. 194, 205, 754 S.E.2d 875, 881 (2014) (discussing the intersection of probate law and mortgage foreclosure actions and holding that “the secured creditor may pursue foreclosure proceedings on the security for the mortgage without presenting a claim against the estate”).

Turning to the merits, the Court of Appeals correctly determined that Petitioner’s lack of standing defense fails as a matter of law because the subject Promissory Note is endorsed in blank, and Wells Fargo is in possession of the original Promissory Note. (R. p. 14–15; August 7, 2019 Order).

Under Article 3 of the Uniform Commercial Code, S.C. Code Ann. § 36-3-301, possession of the original note endorsed in blank is prima facie evidence of ownership. *See In re Woodberry*, 383 B.R. 373, 377 (Bankr. D.S.C. 2008) (“Possession of a bearer instrument is prima facie evidence of ownership”); *see also In re Neals*, 459 B.R. 612, 619 (Bankr. D.S.C. 2011) (holding that where the original note has been presented and there is undisputed evidence the person trying

to enforce the note was also the loan servicer responsible for collecting payments on and enforcing the terms of the note, then such entity has the right of a holder, including the right to enforce the note under South Carolina's version of Article 3 of the UCC). Thus, Wells Fargo indisputably has standing here, and this is a settled point of law that does not warrant extraordinary review by this Court.

B. A secured creditor is not required to file a claim against the probate estate if it is solely seeking to foreclose the mortgage and is not attempting to hold the estate liable for the deficiency following the foreclosure sale. (Questions Presented III and V)

Next, Ms. Hodges rehashes her arguments that the circuit court did not have jurisdiction over the foreclosure and, as a result, Ms. Hodges' due process rights² were violated and the circuit court's orders are void because Wells Fargo's claim is barred. (Pet. at 9–11, 14.)

The Court of Appeals held that “Wells Fargo waived its right to seek a deficiency judgment against Hodges's mother's estate in its complaint. Therefore, the circuit court properly found it had subject matter jurisdiction in this case.” *Wells Fargo Bank, N.A. v. Hodges*, No. 2019-001565, 2022 WL 3440355, at *3 (S.C. Ct. App. filed Aug. 17, 2022).

On appeal, Ms. Hodges does not point to any overlooked information in the record that disputes that Wells Fargo waived its right to seek a deficiency judgment. Instead, Ms. Hodges seems to take issue with the fact that the subject Promissory Note was presented as evidence in this foreclosure action and, from this evidence, concludes that Wells Fargo is seeking a deficiency judgment against her mother's estate that is time-barred. (Pet. 10–11.) However, Petitioner is

² Wells Fargo is not a government entity. *See Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004) (to prove denial of substantive due process, the party must show that a government actor deprived her of a cognizable property interest).

incorrect because Wells Fargo expressly waived its right to a deficiency judgment in its pleadings. (R. p. 159; Compl. ¶ 13.)

Under the South Carolina Probate Code, a secured creditor is not required to file a claim against the probate estate if it is solely seeking to foreclose the mortgage and is not attempting to hold the estate liable for the deficiency following the foreclosure sale. *See* S.C. Code Ann. § 62-3-104 (“This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.”); *see also Beach First Nat’l Bank v. Gurnham (In re Estate of Gurnham)*, 407 S.C. 194, 205, 754 S.E.2d 875, 881 (2014) (discussing the intersection of probate law and mortgage foreclosure actions and holding that “the secured creditor may pursue foreclosure proceedings on the security for the mortgage without presenting a claim against the estate.”).

Because Wells Fargo waived its right to seek a deficiency judgment in its complaint, the circuit court correctly held that subject matter jurisdiction was proper because Wells Fargo “is not seeking a deficiency judgment against the estate.” (R. p. 10; August 7, 2019 Order.) Based on these findings, it is clear Wells Fargo was not required to file a claim in Petitioner’s mother’s probate estate, as such Wells Fargo’s claim is not time-barred, and the Court should reject Ms. Hodges’ argument to the contrary. Just as above, this is settled South Carolina law, and it does not come close to the high bar required for certiorari review.

CONCLUSION

Because this case does not meet any of the criteria for granting certiorari, the Court should deny Ms. Hodges’ petition and remit this matter back to the circuit court.

Respectfully submitted,

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