THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2019-001732

Opinion No. 2023-UP-264 (S.C. Ct. App. filed July 12, 2023)

Kathleen A. Grant, Dylan T. Grant,
Devin D. Grant, and Andrea J. Grant,

Petitioners,

v.

Nationstar Mortgage, LLC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certify that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 9, 2023.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that sophisticated financial institutions that prepare mortgages have no duty to notify innocent remaindermen when a life tenant seeks to encumber the remaindermen's fee simple interest in the subject property?
2. Did the Court of Appeals err in holding that sophisticated financial institutions that prepare mortgages have no duty to ensure that the mortgage applicant in fact holds a sufficient legal interest to encumber the property so as to protect all other pertinent interests?
3. Did the Court of Appeals err in failing to consider and/or apply any equitable doctrines, principles, or maxims in its analysis of whether a mortgage obtained by a life tenant is valid and enforceable against the surviving remaindermen, particularly where the financial institution that prepared the mortgage (a) received notice that the life tenant and remaindermen's interests were subject to the terms of a Will, (b) willfully ignored the existence of the Will and did not even bother to read it to see if the mortgage was permissible, (c) failed to make any inquiry as to the life tenant's reason for seeking the mortgage, (d) failed to notify any of the remaindermen as to its placement of a $625,000 mortgage on the property against their fee simple interests, and (e) the entire $625,000.00 was spent for the support of the life tenant with none of it being spent in furtherance of his obligation to protect the Remaindermen?
4. Did the Court of Appeals err in misconstruing the testamentary intent of the decedent, disregarding, *inter alia*, her explicit instructions that David, the life tenant, "shall not in any

event be entitled, directly or indirectly, to consume or otherwise retain any principal of this estate absolutely as his own, or have or possess any substantially equivalent powers or rights, and the provisions of *this ARTICLE* [V] *and of this Will in general* shall be construed accordingly?"

STATEMENT OF THE CASE

On August 29, 2017, Kathleen Grant, Dylan Grant, Devin Grant, and Andrea Davis ("Remaindermen") brought this action seeking a declaratory judgment as to whether a mortgage obtained by David Grant, in his stated capacity as a life tenant and purported trustee, was valid against them.[1] The Remaindermen contended that the Mortgage was not valid because (1) Countrywide was put on notice that David held a life interest in the property by virtue of a Will, (2) Countrywide willfully ignored the existence of the Will and did not even bother to read it, turning a blind eye to the express limitations and restrictions contained therein as to David's ability to mortgage the property, (3) David did not obtain the mortgage in furtherance of his obligation to protect the Remaindermen taking after him and did not otherwise have authority to obtain the mortgage, (4) Countrywide and its representatives failed to inquire as to David's reason for seeking a mortgage so as to ascertain whether it was permissible, (5) Countrywide never notified the Remaindermen regarding the placement of a $625,000.00 mortgage on the property against their interests, and (6) the entire $625,000.00 was spent for the support of the life tenant with none of it being spent in furtherance of his obligation to protect the Remaindermen. (R. pp. 22-25).

[1] Respondent Nationstar Mortgage, LLC is the successor in interest to Countrywide Home Loans, Inc.

A non-jury bench trial was held on July 30, 2019 before the Honorable Bentley D. Price in Charleston County, Court of Common Pleas. (Transcript, R. pp. 131-358). At trial, the Remaindermen asserted that this was an action in equity because the Remaindermen were challenging the validity and enforceability of the mortgage on the Property. (R. p. 139:24 to 149:3). Defendant Nationstar Mortgage Inc. ("Nationstar"), Countrywide's successor in interest, contended that no equitable principles applied to this case, that such principles should not be considered, and that the validity and enforceability of a mortgage is purely a matter of law, not equity. (R. at Ibid.)

On August 14, 2019, the Circuit Court entered an Order finding that (1) the lawsuit was an action at law[2], (2) that the mortgage was a valid encumbrance on the property under the express terms of the Will and the purported testamentary trust created therein, (3) that despite placing a $625,000.00 mortgage on the Property, David Grant, the life tenant, had not invaded the principal of the Property, (4) that by mortgaging the property for $625,000.00, the life tenant had protected the interests of the Remaindermen because the Mortgage Lender had required that taxes and homeowners insurance be paid out of escrowed mortgage premiums, and that by doing so, the property had been kept "in the family name," (5) that even if David Grant, the life tenant had misused the loan proceeds, Countrywide/Nationstar had no duty that inures to the benefit of the Plaintiffs, and (6) that the $625,000.00 mortgage placed on the Property by Countrywide (and subsequently assigned to Nationstar) remains a valid, first priority lien on the Property and is enforceable against the innocent Remaindermen. (Order, R. pp. 9-20).

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[2] In finding that the lawsuit was an action at law, and not an action in equity, the lower court declined to address any of the equitable principles raised by the Remaindermen.

On August 22, 2019, Petitioners filed a *Motion to Alter or Amend the Court's Order Filed August 14, 2019 Pursuant to Rule 59(e)*. On September 27, 2019, the Circuit Court denied the *Motion to Alter or Amend.* (Order, R. p. 21).

Petitioners filed their *Notice of Appeal* on October, 10, 2019. Thereafter, the parties filed Final Briefs with the Court of Appeals. (App. pp. 1-76). Oral argument was held before the Court of Appeals on December 5, 2022.

On July 12, 2023, the Court of Appeals issued a per curiam, unpublished opinion, wherein it modified the lower court's order, finding that Petitioners' action was indeed equitable in nature, but holding that sophisticated financial institutions that prepare mortgages (a) have no duty to notify innocent remaindermen when a life tenant seeks to encumber the remaindermen's fee simple interest in the subject property, (b) that said institutions have no duty to ensure that the mortgage applicant in fact holds a sufficient legal interest to encumber the property so as to protect all other pertinent interests, and (c) finding that the life tenant was authorized to mortgage the property "as he saw fit" despite the express limitations set forth in the Will, which Countrywide never bothered to read in the first place. (Opinion, App. pp. 77-84). The Court of Appeals did not apply any equitable doctrines, principles, or maxims to the facts of this case despite finding that Petitioners' action was equitable in nature.

On July 27, 2023, Petitioners filed a Petition for Rehearing. (App. p. 85). On August 9, 2023, the Court of Appeals denied the Petition for Rehearing. (App. p. 110).

As set forth below, Petitioners seek a Writ of Certiorari on the grounds that the Court of Appeals' unpublished opinion directly conflicts with this Court's prior decisions in *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 746 S.E.d 35 (2013), *Kirkham v. First Nat. Bank*, 149, S.C. 545, 147 S.E. 648 (1929), and *Ingram v. Kasey's Associates*, 340 S.C. 98, 532 S.E.2d 287

(2000). Additionally, the Court of Appeals' opinion contravenes its own decision in *Shepard v. First Am Mortgage Co.*, 347 S.E.2d 118 (Ct. App. 1986). Finally, this matter is an appropriate candidate for certiorari because it presents a novel question of law: Whether sophisticated financial institutions which prepare mortgages must notify innocent remaindermen of the institution's intent to encumber the remaindermen's fee simple interests in real property.

MATERIAL FACTS

The Property

The property at issue in this case is a single-family home located at 1 Wall Street in downtown Charleston, South Carolina ("Property"). (Stip. of Facts, R. p. 497; Complaint, R. p. 3, para. 4). The late Roberta R. Grant ("Roberta") purchased the Property on June 25, 1987. (Stip. of Facts, R. p. 497). Roberta died testate on December 28, 1988, bequeathing a life estate in the Property to her Husband, David E. Grant ("David"), and leaving the remainder interest to her four children, Kathleen Grant, Dylan Grant, Devin Grant, and Andrea Davis (collectively, "Petitioners" and/or "Remaindermen"). (Stip. of Facts, R. p. 498, para. 4-5; Will of Roberta Grant, R. pp. 428-433; Deed of Dist., R. pp. 487 and 490).

The Limitations on David's Life Estate

Roberta's Last Will and Testament ("Will") set forth express limitations and restrictions as to David's life estate interest in the Property. (Will, R. pp. 431- 433). Specifically, Article V, Section 1(b) of the Will instructed, *inter alia*, that David could not consume or retain any principal of this estate as his own and that the provisions of Article V and of the Will in general should be construed in accordance with this restriction:

> *He [David] shall not in any event* be entitled, directly or indirectly, to consume or otherwise retain any principal of this estate absolutely as his own, or have or possess any substantially equivalent powers or rights, and the provisions *of this ARTICLE*

> *and of this Will in general* shall be construed accordingly. [Emphasis added] (R. p. 431)

Article V of the Will also instructed that David shall possess the power and authority to mortgage the Property, but only in furtherance of his obligation to protect the Remaindermen taking after him. (R. pp. 431- 432). Specifically, Article 5, Section 1(d) instructed as follows:

> David E. Grant shall be obligated to invest and reinvest the properties from time to time constituting the assets of such life estate, in order to protect the remaindermen taking after him, and *in furtherance of said obligation* he shall have and possess full power and authority during his lifetime to mortgage or pledge all or any portion of such property [...] upon such terms and conditions as he in his absolute discretion may deem most advantageous, *taking into account the protection of the remaindermen taking after him.* [Emphasis added]. (R. pp. 431-432)

Article V, Section 1(f) of the Will also left instructions for the creation, funding, and administration of separate trusts to benefit each of the Remaindermen upon the occurrence of either of the following: 1) Upon Roberta's death if she were predeceased by David, or 2) Upon David's death if he survived Roberta, but failed to leave a will exercising the "power of appointment" afforded to him under Article V, Section 1(e) of Roberta's Will. (R. p. 432). Absent these two limited circumstances, which never occurred, the Will does not provide instructions for the creation, funding, or administration of trusts for the Remaindermen.

Life after Roberta's Death

David remarried in 1993. (R. p. 222:15-18; p. 253:17). Soon after Roberta's death, he began taking out mortgages on the Property, each time invading the principal. (Stip. or Facts, R. pp. 499-501). These mortgages culminated in the $625,000.00 mortgage placed on the Property by Countrywide that is the subject of this action, and which is described in detail below. (Stip. Of Facts, R. p. 501; Mortgage, R. p. 450; R. p. 217:17-21). David died on July 3, 2016, having

exhausted all mortgage proceeds received from the Property. (Stip. of Facts, R. p. 501; R., p. 222:16). At the time of his death, David had left approximately $3,000.00 in his estate. (R. p. 224:10-15).

At trial, the Remaindermen provided testimony that the Property had been encumbered without their knowledge; that neither Countrywide, Nationstar, nor any of their representatives had ever notified them about their intent to place a $625,000.00 mortgage on the Property, and that no mortgage proceeds had been used in furtherance of protecting their interests. (R. p. 229: 8-19; p. 243:12-15; pp. 247:18 to 248:9; pp. 254:19 to 255:8; p. 185:12-15; p. 303:11-15). The Remaindermen also testified that David, contrary to their interests, had failed to maintain the property or provide necessary repairs during his life tenancy and that the Property had deteriorated and fallen into terrible disrepair. (R. pp. 226:23 to 228: 25; pp. 246:16 to 247:17; pp. 251:18 to 252:3; pp. 252:23 to 254:18). There was also testimony that David had stopped working after Roberta passed, and had no demonstrable income other than the mortgage proceeds he obtained on the property. (R. p. 248:1-9).

The Countrywide Mortgage

On March 14, 2007, Countrywide, upon David's application, placed a $625,000.00 mortgage on the Property. (Stip. of Facts, R. p. 501; Mortgage Application, R. p. 359; Mortgage, R. p. 450). Although the mortgage that was filed with the Charleston County Register of Mesne Conveyance (the "RMC") listed David Grant as a "Trustee under the Last Will and Testament of Roberta R. Grant," it is notable that the mortgage application did not state that David Grant was seeking a mortgage in his capacity as Trustee on behalf of the Remaindermen. Rather, the mortgage application indicated that David was seeking a mortgage *in his own name* and that title would be held in fee simple. (Application, R. p. 359). In addition, David did not sign the

mortgage application as "Trustee under the Last Will and Testament of Roberta Grant," but simply as David Grant. (R. p. 361).

As part of his duties, the closing attorney for the subject mortgage transaction performed a title examination on the Property. (R. p. 192:18-21). His examination revealed the Deed of Distribution, filed with the RMC on November 16, 2016. (Stip. of Facts, R. pp. 499-500; Deed of Dist., R. p. 486). The Deed of Distribution evidenced that David Grant did not hold title in fee simple, but rather that he merely held a life interest in the Property by virtue of Roberta Grant's Last Will and Testament and that Roberta's descendant's (i.e. her children) held the remainder interest. (Deed of Dist., R. pp. 486 and 490; R. pp. 175:24 to 176:5).

The mortgage resulting from the David's application was recorded in the RMC on March 19, 2007 ("Subject Mortgage"). (Stip. of Facts, R. p. 501; Mortgage, R. p. 450). It noted the mortgagers as "David E. Grant and Martha S. Grant (David's second and since-deceased wife) and David Grant as Trustee under the Last Will and Testament of Roberta Grant". (Mortgage, R. p. 450). In other words, David Grant was listed individually and as a purported trustee under Roberta's Will, but there was no mention of David's life estate interest in the Property or even the existence of any Remaindermen. On September 3, 2013, the Subject Mortgage was purchased and assigned to Countrywide's successor-in-interest, Nationstar Mortgage, Inc. ("Nationstar" and/or "Respondent"). (Stip. of Facts, R. p. 501; Assignment, R. p. 493).

An Out-of-the-Ordinary Transaction

The closing attorney for the Subject Mortgage transaction testified that he had found it "out of the ordinary" for a life tenant to seek a permanent mortgage on property—so out of the ordinary—that he consulted with his law partner to see whether they could figure out if David, as a life tenant, had authority to mortgage the Property under Roberta's Will. (R. p. 165:2-9; p.

206:6-16; p. 212:3-7). The law partner, in turn, suggested that the closing attorney "run it up the flag" and consult the title insurance company responsible to Countrywide for insuring the validity and enforceability of the mortgage.[3] (R. p. 206:6-16; p. 212:3-7).

Following the advice of his law partner, the closing attorney consulted the title insurance company to see whether it would issue a policy to Countrywide insuring the validity and enforceability of the mortgage without any exceptions (i.e. without placing any restrictions on David's ability to obtain the mortgage). (R. pp. 212:19 to 213:17). A representative for the title insurance company testified that the closing attorney raised the aforementioned concern to him and that, despite the concern, the title insurance company decided it would issue a policy to Countrywide insuring the validity and enforceability of the mortgage without any special exceptions. (R. pp. 318:7 to 319:14; pp. 322:8 to 323:3). As the closing attorney confirmed in his testimony, "the title company took the risk." (R. p. 213:2-17).

The issuance of a title insurance policy to Countrywide was an integral component of the mortgage transaction. (R. p. 212:13-14; p. 321:16-23). The closing attorney testified, "Every real estate closing we've been doing [in the] last twenty years requires title insurance. And if you don't get title insurance, you can't get a loan." (R. p. 213:2-4). He further testified that title insurance is there, because if there is a mistake, then the title insurance company would protect the bank making the loan. (R. p. 213:5-8).

A Lack of Inquiry and Failure to Notify

Following the title insurance company's decision to insure the mortgage, the closing attorney issued an opinion letter to Countrywide stating that David held a life interest in the

[3] The closing attorney testified that, in performing his duties at the closing, he was acting as an agent of the title insurance company. (R. p. 173:19-22).

Property by virtue of Roberta's Will and that Roberta's children held the remainder interest, but that, nonetheless, Countrywide would have a fully enforceable fee simple mortgage to foreclose on, which would not only divest David from any interest he had in the Property, but also the Remaindermen's fee simple interest. (Opinion Letter, R. p. 365; R. p. 183:6-9).

The opinion letter failed to mention any of the limitations and restrictions imposed on David's life estate by Roberta's Will. (Opinion Letter, R. p. 365). Nonetheless, the letter put Countrywide on notice as to (1) David's life estate interest in the Property, (2) the existence of Roberta's Will, and (3) of the Remaindermen's interest in the property. At trial, the closing attorney testified that Countrywide, having received notice, could have exercised its right to request a copy of Roberta's Will as part of its evaluation of the mortgage application:

> Q. Would you agree with me, Mr. [Bill] Barr, that once they [Countrywide] knew that there was a life estate, they had the right, if they wanted to -- and that there was a will, they had the right, if they wanted, to look and see what the will said with regard to the transfer of the life estate?
>
> A. If they wanted to, like I stated in our deposition.
>
> Q. And if they had done that, then they would have clearly known -- if they had done that, they would have seen the language that we referenced in Article V, section (d), that set forth the requirement and the duty to protect the remaindermen taking out the loan, correct?
>
> A. If they had wanted to.
>
> Q. All of that was at their disposal?
>
> A. Yeah. They could ask for anything they wanted and it would have been provided. (R. pp. 180:15 to 181:5)

Countrywide did not request a copy of the Will from the closing attorney. (R. p. 185:18-21). Countrywide never inquired as to David's reason for seeking a mortgage, nor did it contact any of the Remaindermen about placing a $625,000.00 mortgage on the Property against their

interests. (R. p. 229:8-19; p. 243:12-15; pp. 247:18 to 248:9; pp. 254:19 to 255:8; p. 185:12-15; p. 303:11-15) Instead, Countrywide turned a blind eye to the existence of Roberta's Will and the limitations set forth therein. The Mortgage did not even make reference to the existence of David's life estate in the Property. (Mortgage, R. p. 450; R. p. 308:21-25). At trial, the closing attorney testified that if Countrywide had chosen to review Roberta's Will and actually read the limitations, that based on the totality of the circumstances, Countrywide might have "changed their mind." (R. pp. 181:14 to 182:6). It might not have issued the mortgage. (R. p. 182: 4-6).

Conflicts of Interest

Although the closing attorney, testifying solely as a fact witness, attempted to defend his opinion that the mortgage was valid and enforceable against the Remaindermen, he acknowledged that (1) the title insurance company was defending the present lawsuit and (2) he had acted as their agent during the closing. (R. pp.173:19 to 174:5; p.172:2-5). The closing attorney also acknowledged that if his opinion regarding the enforceability of the mortgage was incorrect, the title insurance company might try to hold him responsible. (R. pp. 174:2-5).[4]

Counsel for Nationstar also called several witnesses lacking any first-hand knowledge of the mortgage transaction. It is incontrovertible that each of these witnesses had conflicts of interest. Over the Remaindermen's objection, a representative from Nationstar testified as to Countrywide's mortgage practices. (R. pp. 277-309). The Nationstar representative had never

[4] Although the closing attorney's concerns regarding his professional liability are somewhat understandable, it is worth noting that the title insurance company was not prejudiced by the closing attorney because he contacted the company, raised his concerns about the Will's language, and obtained a determination directly from the company that it would insure the mortgage despite the limitations contained in the Will. (R. p. 301:20-23; pp. 318:7 to 319:4; pp. 322:8 to 323:3). Nationstar—Countrywide's successor in interest—is not without remedy under these circumstances because Countrywide obtained title insurance in case there was just such a mistake with the mortgage. (R. p. 174:2- 5).

worked at Countrywide and possessed no first-hand knowledge of how the Subject mortgage was handled. (R p. 277:15 to 278:8; p. 285:13-21; pp. 303:25 to 304:13; p. 303:20; p. 308:1-10; p. 295:8-13; p. 302:3-5). Also over the Remaindermen's objection, Counsel for Nationstar put forth a representative from the title insurance company as a witness despite the fact that (1) the present action was against Nationstar, not the title insurance company, (2) the title insurance company's decision to insure the mortgage is not in any way relevant to whether the mortgage is actually valid and enforceable, and (3) the title insurance company was defending Countrywide in the present lawsuit and trying to limit its own liability. (R. p. 173:19 to 174:5; pp. 310:3 to 316:15).

Diffusion of Responsibility

Countrywide went out of business due, in large part, to the mortgage practices it employed leading up to the financial crisis of 2007-2008. (R. pp. 303:25 to 306:1). As noted above, Countrywide never reviewed the Will, never inquired as to David's reason for taking out the mortgage, and never contacted any of the Remaindermen about placing a $625,000.00 mortgage on the Property. Nationstar, Countrywide's successor-in-interest, now seeks to enforce the mortgage against the innocent Remaindermen and foreclose on the Property to their detriment. (R. p. 283:12-17; p. 309:4-9). As the closing attorney testified at trial, "[I]f you've ever been to foreclosure sales, basically, anybody that goes through [a] foreclosure sale is trying to steal a property for as little as they can." (R. p. 210:18-21).

ARGUMENT

I. The Court of Appeals properly determined that the instant action was an action in equity, but then erred in failing to apply any equitable doctrines, principles, or maxims to its analysis.

The Court of Appeals correctly determined that the instant action was an action in equity because Petitioners' main purpose was to obtain a declaratory judgment as to whether the mortgage was valid and enforceable against innocent Remaindermen who were never notified by Countrywide that it was placing a $625,000.00 encumbrance against their interests in the property. Despite modifying the lower court's order, the Court of Appeals erred in failing to consider and/or apply any equitable doctrines, principles, or maxims in its analysis of the case. In *Ingram v. Kasey's Associates*, this Court reversed the Court of Appeals for several reasons, but the very first reason, listed in the very first paragraph of the decision was that "the Court of Appeals used no equitable doctrines even though Ingram [the Plaintiff] sought an equitable remedy." *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000). This identical reason for reversal exists here and alone is a sufficient ground to reverse the Court of Appeals' unpublished opinion.

It has also long been acknowledged that "Courts [in this State] have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 310 S.E.2d 440, 442, 279 S.C. 592, 595 (Ct. App. 1983) In exercising these inherent equitable powers, at least four equitable maxims recognized as equitable guidelines by South Carolina case law should apply: 1) Equity will not suffer a wrong without a remedy, 2) Equity abhors a forfeiture, 3) Equity regards as done what ought to be done, and 4) Good guys should win and bad guys should lose. *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421 at n.1, 746 S.E.d 35 at n.1 (2013), *Bank v. Wingard Properties Inc.*, 394 S.C. 241, 715 S.E.2d 348, 353 (Ct. App. 2011); *See also* Roger Young and Stephen Spitz, Suem—Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose, 55 S.C. L. Rev 175, 188 (Fall 2003).

Here, the Court of Appeals' unpublished opinion errs in failing to consider and/or apply any equitable principles or maxims raised by Petitioners, and by allowing Countrywide to misconstrue and hide behind Roberta Grant's Last Will and Testament—a Will which Countrywide knew about, but never even bothered to read before issuing the mortgage. (R. p. 185:18-21).

As set forth above and in Appellant's Final Brief, Countrywide was put on notice by the closing attorney that David Grant held a life interest in the property *by virtue of Roberta's Will* and that Roberta's children held the remainder interest. (App. Final Brief, p. 10). Countrywide, having received notice, should have exercised minimal due diligence and requested a copy of Roberta's Will as part of its evaluation of the mortgage application and—at the very least—contacted the Remaindermen about its intent to encumber the property and divest them of their fee simple interests. (R. pp. 180:15 to 181:5). It did neither.

Instead, Countrywide ignored the existence of Roberta's Will and the limitations set forth therein. The Mortgage did not even make reference to the existence of David's life estate in the Property. (Mortgage, R. p. 450; R. p. 308:21-25). At trial, the closing attorney testified that if Countrywide had actually chosen to review Roberta's Will and read the limitations, that based on the totality of the circumstances, Countrywide might have "changed their mind". (R. pp. 181:14 to 182:6). It might not have issued the mortgage. (R. pp. 182:4- 6).

Countrywide deliberately turned a blind eye to the express limitations left by Roberta in her Will: It ignored that "David shall not in any event be entitled, directly or indirectly, to consume or otherwise retain any principal of this estate absolutely as his own, or have or possess any substantially equivalent powers or rights." (Will, R. p. 431). It ignored Roberta's instructions that the provisions of Article V and the Will in general (including any purported

testamentary trust language) shall be construed in accordance with this express limitation. (Will, R. p. 431). It ignored that David could only mortgage the Property in furtherance of his obligation to protect the Remaindermen taking after him. (Will, R. pp. 431-432). Countrywide, who according to Nationstar had "suffered a black eye" and went out of business due to its business practices, never contacted any of the Remaindermen about placing a $625,000.00 mortgage on the Property. (R. p. 276:3-17; p. 305:21 to 306:1).

The Court of Appeals' unpublished opinion errs in finding that Countrywide and its successor-in-interest, Nationstar, had no duties that inure to the benefit of the completely innocent Remaindermen. (Order, R. p. 20) The lower court had based its analysis on the tenuous premise that banks and mortgage lenders only have duties to their customers and not third parties. (Order, R. pp. 18-19) This is incorrect. As noted by this Court in *Wachovia v. Coffey*, sophisticated financial institutions that prepare mortgages have a duty to third parties so as to protect all pertinent interest:

> We stress that sophisticated financial institutions that prepare mortgages purporting to encumber a customer's property must ensure that the customer in fact holds a legal interest in that property so as to protect all pertinent interests. Concomitantly, South Carolina courts should not stretch equitable principles to unfairly place fault on parties who did not contribute to the underlying transaction. See, e.g., McClintock on Equity, at 320 [...] We earnestly appreciate the dissent's concerns. However, we would be more concerned with an equitable doctrine so broad as to allow lenders to ameliorate their complete failure to exercise proper due diligence at the expense of third parties.
>
> [Emphasis added]
>
> *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421 at n.1, 746 S.E.d 35 at n.1 (2013)

The Court of Appeals' unpublished opinion contravenes this Court's decision in *Wachovia v. Coffey*, stating "[Petitioners'] reliance upon this statement, in isolation, decontextualizes its meaning and misconstrues longstanding South Carolina precedent."

(Opinion, at App. p. 84). Respectfully, Petitioners do not decontextualize nor misconstrue this Court's decision in *Wachovia Bank, N.A. v. Coffey*. To the contrary, this Court's decision in *Wachovia* is consistent with and supported by longstanding South Carolina precedent protecting the rights of remaindermen. *See Kirkham v. First Nat. Bank*, 149, S.C. 545, 147 S.E. 648, 649 (1929), cited by the Remaindermen at trial and in this Appeal, which states:

> It should be, and is, the purpose of this court, in situations similar to the one in the Des Champs Case (Des Champs v. Mims, 145 S.E.2d 623 (1926)) and to the one in the case at bar, to protect the rights of remaindermen, both vested and contingent, and all persons, in being and unborn, who may at any time have an interest in real estate, according to the terms of wills and deeds. In other words, as far as possible, this court proposes to carry out the real intention of testators and grantors, as expressed in their wills and deeds." [Emphasis Added]

In this instance, Equity strongly supports that the innocent Remaindermen be protected from a mortgage that was never disclosed to them. It is undisputed that Countrywide never contacted the Remaindermen about its intent to place a $625,000.00 mortgage on the property, despite being put on notice of the Remaindermen's fee simple interest. (R. p. 229:8-19; p. 243:12-15; pp. 247:18 to 248:9; pp. 254:19 to 255:8; p. 185:12-15; p. 303:11-15). The closing attorney, demonstrating doubts as to the validity and enforceability of the mortgage, contacted the title insurance company to see whether it would insure the mortgage for Countrywide. (R. p. 185:12-15; p. 303:11-15). The title insurance company "took the risk" as to whether the mortgage was valid and enforceable, but nobody—not Countrywide, not the title insurance company, not even the closing attorney—contacted the Remaindermen. Nobody inquired as to David's reason for applying for a mortgage. (R. p. 187:4-12; p. 213:9-17). All expressed concern as to Countrywide's bottom line, but nobody expressed concern or exercised any due diligence with regard to the Remaindermen's fee simple interest in the property. Equity cannot stand for a

such a proposition, where a lender is allowed to "ameliorate their complete failure to exercise proper due diligence at the expense of third parties." Minimally, Countrywide should have contacted the Remaindermen once it was put on notice of the Remaindermen's fee simple interest in the property.

In *Shepard v. First Am Mortgage Co.*, 347 S.E.2d 118 (Ct. App. 1986), Justice Bell suggested a brilliant solution for a similarly extraordinary problem. In *Shepard*, there were two totally innocent parties before the Court. Both had valuable interests that could not be reconciled. Some innocent party had to lose. An innocent but incompetent grantor had been induced by a family member to convey his property to that family member. In turn, that person mortgaged the property to a totally innocent lender. As Justice Bell saw the equitable problem:

> The court is faced with a problem of the equities between two innocent parties--the incompetent grantor and the innocent third party mortgagee. In this situation, the equities favor the incompetent grantor. The third party mortgagee is in a superior position to protect himself. He can take warranties of title from the mortgagor and he can also insure against undisclosed defects in the mortgagor's title by purchasing mortgagee's title insurance. Commercial lenders like First American commonly protect against the risk of defects in the mortgagor's title in both ways. The incompetent, on the other hand, is incapable of conducting his own affairs or protecting his own interests. His need for protection by the court of equity is correspondingly greater than the mortgagee's. If we held an incompetent's transactions could be made valid by a subsequent transaction with an innocent third party, we would create an open avenue for disposing of an incompetent's property through fraud and imposition.
>
> *Shepard v. First American Mortg. Co.*, 347 S.E.2d 118, 120, 289 S.C. 516, 519 (Ct. App. 1984) [Emphasis added]

Here, Countrywide, Nationstar's predecessor-in-interest, is not innocent. It knew that David only held a life estate by virtue of Roberta's Will. It knew that the Remaindermen held a fee simple interest in the property. Yet, it never even read the Will. It never considered any of

the limitations contained therein. It never contacted the Remaindermen. Like the lender in *Shepard*, Nationstar is in a superior position to protect itself because it obtained title insurance to protect against this very issue. The closing lawyer even anticipated that there could be an issue with the validity and enforcement of the mortgage and "ran it up the flagpole" with higher-ups at the title insurance company. (R. p. 206:6-16; p. 212:3-7). The title insurance company "took the risk." (R. p.213:9-17).

Appellant's respectfully request that this Court, just as Justice Bell did, ask:

1. Who is in the better position to protect themselves?
2. Who better deserves the protection of Equity?
3. Who was more able to avoid the problem the Court confronts?

Nationstar, Countrywide's successor-in-interest, wishes to construe the language of the testamentary trust contained in the Will (a Will that Countrywide knew about, but never bothered to request or read) with the hopes of enforcing a mortgage against the completely innocent Remaindermen. Much like the lender in *Wachovia v. Coffey*, Countrywide/Nationstar "is the architect of its own problem," having failed to "exercise proper due diligence at the expense of third parties." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 424, 746 S.E.d 35, 37. Accordingly, for the foregoing reasons, Petitioners respectfully submit that the subject mortgage should be cancelled as to these completely innocent Remaindermen.

II. The Court of Appeals' unpublished opinion misconstrues Roberta Grant's testamentary intent in finding that David Grant had the authority to mortgage property as he saw fit.

The Court of Appeals cites three cases in support of the proposition that David had a right to mortgage the property "as he saw fit." However, a closer review of each of these cases along with the subject Will reveals that the opposite is true.

First, the Court's opinion cites *First Nat. Bank v. Hutson*, for the proposition that "a life tenant may execute a mortgage *to the fullest extent of their life estate*." *First Nat. Bank v. Hutson*, 142 S.C. 239, 244 140 S.E. 596, 597 (1927). [Emphasis added]. That is not what happened here. Countrywide/Nationstar sought to divest more than David's mere life interest in the property—which they could have done only for the duration of David's life—they also expressly sought to divest the Remaindermen of their interest in fee simple. Following the title insurance company's decision to insure the mortgage, the closing attorney issued an opinion letter to Countrywide stating that David held a life interest in the subject property by virtue of Roberta's Will and that Roberta's children held the remainder interest, but that Countrywide would nonetheless have a fully enforceable fee simple mortgage to foreclose on, which would divest not only David from any interest he had in the property, *but also the Remaindermen's fee simple interest.* "[T]he bank will have a fully enforceable fee simple mortgage to foreclose on which will divest Mr. Grant and Mrs. Grant [David's second wife] from any interest they have in the house, not only of their life interests, but also of the remaindermen in fee simple." (Opinion Letter, R. p. 365, R. p. 183:6-9.). This goes well beyond divesting the life tenant of his life estate. It seeks to use the mortgage obtained by a life tenant to divest the Remaindermen as well. Because the bank sought the ability to foreclose on the Remaindermen and divest them of their fee simple interest, it had an equitable duty to contact them in the first place.

Additionally, *First Nat. Bank v. Hutson* does not address a central issue of this case: whether a bank is required to provide notice to a remainderman of its intent to encumber and/or divest the remainderman's interest in real property. "The sole question presented by this appeal is: What estate did Ethel O. Hutson take in the real estate devised by the testator?" *First Nat. Bank v. Hutson*, 142 S.C. 239, 244 140 S.E. 596, 597 (1927). Because the case does not address

the issue of Notice, its applicability to the present case is misplaced.

Second the Court of Appeals' unpublished opinion cites *Bethea v. Bass*, for the proposition that "a mortgage executed by a life tenant covers only his life estate interest and not a fee interest." *Bethea v. Bass*, 240 S.C. 398, 412, 126 S.E.2d 354. This is a true statement and also the opposite of what transpired in this case. As noted, *supra*, Countrywide/Nationstar sought to divest more than David's mere life interest in the property, they also expressly sought to divest the Remaindermen of their interest in fee simple. It is both inequitable and disgraceful for a bank to use a mortgage granted to a life tenant to later divest innocent remaindermen of their fee simple interest, especially, when the bank—knowing of the remaindermen's interest—does not even contact them to inform them of the encumbrance. As noted *supra*, Countrywide did not exercise any due diligence. Countrywide did not even read the Will, which it asked the lower courts to misconstrue.

Additionally, it is essential to note that in *Bethea v. Bass*, this Court actually took steps to *protect* the remainderman's interest, not divest him. There, the decedent, Thomas D. Bethea, Sr., held a life estate interest in certain property, which he mortgaged in 1925. The property was later foreclosed upon. Pursuant to the decree of foreclosure, the property was sold and conveyed to Mr. Howard H. Bass by way of master deed in 1931. Mr. Bass continued to own and possess the property until his death in May, 1954, when his interest in the property passed to his family. Five years later, Thomas D. Bethea, Sr. died. His son, Thomas M. Bethea, Jr. then, for the first time in twenty-seven years, notified Mr. Bass's family of his claim of ownership, and demanded possession. The family refused to surrender possession, claiming that they owned the property in fee simple; and shortly thereafter he commenced the action. Ultimately, the South Carolina Supreme Court found for the remainderman noting that a life tenant cannot encumber the

remaindermen's interest. The Court reasoned:

> Thomas M. Bethea, Sr. took a life estate only, and the respondent, Thomas M. Bethea, Jr., a contingent remainder, which became vested upon his father's death in 1959. The mortgage from Thomas M. Bethea, Sr., in 1925, though purporting to include the fee, covered only his life estate, for that was all that he had; and the Master's deed in the foreclosure could convey no more. Griggs v. Griggs, 199 S.C. 295, 19 S.E.2d 477. Nor did the length of possession under that deed bar respondent's claim, for his cause of action did not accrue until his father's death. Crotwell v. Whitney, 229 S.C. 213, 92 S.E.2d 473.
>
> Bethea v. Bass, 126 S.E.2d 354, 360, 240 S.C. 398, 412 (1962)

Here, David Grant, like Mr. Thomas Bethea, Sr., held a life estate in the property. Likewise, the mortgage did not make any reference to David's life estate. (Mortgage, R. p. 450; R. p. 308:21-25). Countrywide/Nationstar cannot now equitably divest the Remaindermen of their fee simple interest in the property, especially without having provided them with notice of the encumbrance in the first place. To do so would, again, allow Countrywide/Nationstar to "ameliorate their complete failure to exercise proper due diligence at the expense of third parties." Equity regards as done what ought to be done. *Bank v. Wingard Properties Inc.*, 394 S.C. 241, 715 S.E.2d 348, 353 (Ct. App. 2011). Here Countrywide did not do what it was supposed to do—notify the innocent Remaindermen of its intent to encumber the property and divest them of their fee simple interest.

Third, the Court of Appeals' unpublished opinion cites *Johnson v. Waldrop*, 256 S.C. 372, 375, 182 S.E.2d 730, 731 (1971), for the proposition that "'a life estate, with the complete power to dispose and consume' was a valid devise." In *Johnson*, this Court found, upon analysis of the provisions of the Will, that the Decedent had intended to convey a life estate to his wife, with complete power to dispose and consume, and to convey the remainder to his brother and sister. In rendering its decision, this Court found that it could not justify a conclusion which

ignored a second qualifying sentence contained within the Will, stating, "We cannot justify a conclusion that the second sentence in meaningless." Id. 256 S.C. 372, 375, 182 S.E.2d 730, 731 (1971). In the present case, Roberta's Last Will and Testament set forth express limitations and restrictions as to David's life estate interest in the Property. (Will, R. pp. 431- 433). Specifically, Article V, Section 1(b) of the Will instructed, "He [David] shall not *in any event* be entitled, directly or indirectly, to consume or otherwise retain any principal of this estate absolutely as his own, or have or possess any substantially equivalent powers or rights, and the provisions of *this ARTICLE* and of *this Will in general* shall be construed accordingly." [Emphasis added] (Will, R. p. 431).

The Court of Appeals' opinion, however, effectively renders this provision meaningless, ignoring the limitations set forth therein, and finding that it only "restricts David from converting the mortgage proceeds to fee simple." (Order, at App. p. 82). Respectfully, that is not what the provision says. The provision specifically uses the words "not in any event" and states that "the provisions of *this Article* [Article V] and of *this Will in general* shall be construed accordingly." [Emphasis added]. The Court's opinion errs in narrowing the application of this provision, which Roberta Grant expressly intended be applied broadly.

The unpublished opinion also erroneously states "there was no evidence presented at trial that David misused the proceeds of the mortgage by conversion or retention." There was ample evidence that David, contrary to the Remaindermen's interest, had failed to maintain the property or provide necessary repairs during his life tenancy and that the Property had deteriorated and fallen into terrible disrepair, demonstrating that the funds were not used for the benefit of the property or the Remaindermen. (R. pp. 226:23 to 228:25; pp. 246:6 to 247:17; pp. 251:18 to 252:3; pp. 252:23 to 254:18). There was also testimony that David had stopped working after

Roberta passed, and had no other demonstrable income than the mortgage proceeds he obtained on the property. (R. p. 248:1-9).

Article V of the Will also instructed that David shall possess the power and authority to mortgage the Property, but only in furtherance of his obligation to protect the Remaindermen taking after him, and taking into account the protection of the remaindermen taking after him. (Will, R. pp. 431- 432). The Court of Appeals' unpublished also renders this provision meaningless, ignoring the express limitations set forth therein. Contrary to the Court of Appeals' opinion, David did not have the express authority to mortgage the property "as he saw fit." The opposite was true. Roberta Grant *expressly* provided that David only had authority to mortgage the property in furtherance of his obligation to protect the Remaindermen taking after him. (Will, R. pp. 431- 432). It is important to note that the foregoing language is contained under Article V of Roberta's Will. Article V, Section 1(b) of the Will, discussed *supra*, removes any doubt as to Roberta's intent to curtail David's authority to encumber the property by instructing that this mortgage provision (and all provisions in the Will) be construed in accordance to the express limitations and restrictions contained in Section 1(b) ("the provisions of this ARTICLE and of this Will in general shall be construed accordingly." (Will, R., p. 431).

"In assigning meaning to the words used in the will and ascertaining the intent of the testator, the court must view the will as a whole." *Holcombe-Burdette v. Bank of America*, 640 S.E.2d 480, 484 (Ct. App. 2006), citing *Pate v. Ford*, 297 S.C. 294, 299, 376 S.E.2d 775, 778 (1989). "Intent is to be ascertained upon consideration of the entire will." Id., citing *Epworth Children's Home v. Beasley*, 365 S.C. 157, 165, 616 S.E.2d 710, 714 (2005), and "*In re Estate of Prioleau*, 361 S.C. 627, 631, 606 S.E.2d 769, 772 (2004). "[E]ach item of a will must be considered in relation to the other portion." Id., citing *Epworth Children's Home*, 365 S.C. at

166, 616 S.E.2d at 715. "A court may not consider the will piecemeal, but must give due weight to all its language and provisions, giving effect to every part when, under a reasonable interpretation, all the provisions may be harmonized with each other and with the will as a whole." Id., citing *Epworth Children's Home*, 365 S.C. at 166, 616 S.E.2d at 715 (citations omitted). "Arriving at the intent of the testator requires that every item be considered in relation to the other portions of the will. Id., citing *Black v. Gettys*, 238 S.C. 167, 173, 119 S.E.2d 660, 662-63 (1961). "An interpretation that fits into the whole scheme or plan of the will is most likely to be the correct interpretation of the intent of the testator." Id., citing *Epworth Children's Home*, 365 S.C. at 166, 616 S.E.2d at 715.

Here, the entire Will must be read through the lens of Article V, Section 1(b), because that is what Roberta expressly intended. "*He [David] shall not in any event* be entitled, directly or indirectly, to consume or otherwise retain any principal of this estate absolutely as his own, or have or possess any substantially equivalent powers or rights, *and the provisions of this ARTICLE and of this Will in general* shall be construed accordingly." [Emphasis added] (Will, R. p. 431).]

Additionally, even if Countrywide were not required to investigate how the funds were applied, it still had a duty to contact the innocent Remaindermen as to its intent to encumber the property and divest them of their fee simple interest. As noted above, "Sophisticated financial institutions that prepare mortgages purporting to encumber a customer's property must ensure that the customer in fact holds a legal interest in that property so as to protect all pertinent interests." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421 at n.1, 746 S.E.d 35 at n.1. It is their legal duty. It is an obligation that cannot be disregarded and then later excused at the expense of innocent third parties. As this Honorable Court aptly noted, "[W]e would be more concerned

with an equitable doctrine so broad as to allow lenders to ameliorate their complete failure to exercise proper due diligence at the expense of third parties." Id.

CONCLUSION

For each of the foregoing reasons, Petitioners respectfully request that this Honorable Court consider the equities in this case, grant their Petition for a Writ of Certiorari, vacate the Court of Appeals' per curiam unpublished opinion, and give weight to the preponderance of the evidence, which establishes that (1) David Grant did not have the authority to encumber the subject property as he saw fit, and (2) it is inequitable for Nationstar, Countrywide's successor-in-interest, to seek enforcement of the mortgage against innocent Remaindermen who were never notified by Countrywide of its intent to place a $625,000 encumbrance on the property.

Respectfully submitted,

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Attorneys for Petitioners

September 7, 2023
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2019-001732

Opinion No. 2023-UP-264 (S.C. Ct. App. filed July 12, 2023)

Kathleen A. Grant, Dylan T. Grant,
Devin D. Grant, and Andrea J. Grant,

Petitioners,

v.

Nationstar Mortgage, LLC,

Respondent.

PROOF OF SERVICE

I, the undersigned, certify that I have served the *Petition for a Writ of Certiorari* and corresponding *Appendix* on counsel of record via his AIS-designated email on September 7, 2023, at the following email address: lawrence@hershonlawfirm.com.

Pursuant to Rule 262(C)(3), SCACR, and the Order of The Supreme Court of South Carolina, RE: Methods of Electronic Filing Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), a copy of the aforementioned email correspondence is attached.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

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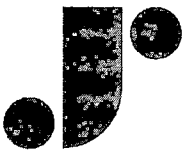
September 7, 2023
Mount Pleasant, South Carolina



September 7, 2023

VIA ONEDRIVE ELECTRONIC SUBMISSION

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

RE: Kathleen A. Grant, et al., v. Nationstar Mortgage, LLC,
Appellate Case No. 2019-001732

Dear Ms. Kitchings:

Attached, for filing, please find the *Petition for a Writ of Certiorari* which was just filed with the South Carolina Supreme Court and the corresponding *Proof of Service*.

Thank you for your assistance with this matter. Should you have any questions or wish to discuss the filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

Enclosures (as stated)

Cc: Stephen A. Spitz, Esq. (Via email only)
Daniel S. Slotchiver, Esq. (Via email only)
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