

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from Greenville County  
Charles B. Simmons, Jr., Master in Equity

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Docket No.: 2010-CP-23-10468

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Bank of America, N.A. .... Respondent,

v.

Todd Draper, Mortgage Electronic Registration  
Systems, Inc., acting, Shawn Kephart, Matthew H.  
Henrikson, The United States of America, by and  
Through its Agency, South Carolina Department of  
Revenue, Branch Banking and Trust Company, and  
Linkside III Homeowners Association, Inc.,

Of Whom Todd Draper and Matthew H. Henrikson are .....Appellants.

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**REPLY TO RESPONDENT'S RETURN TO PETITION FOR REHEARING**

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Appellant restates all arguments set forth in its Memorandum in Support of  
Petition for Rehearing. Respondent in its Return did not address the Court's overlooking  
the fact that while Respondent is a servicer of the loan, servicing rights originate from a  
servicing contract which was not in evidence so the scope of respondents rights as service  
may or may not have included the right to foreclose such that Respondent failed to make  
a prima facie case that it any right to foreclose deriving from the owner of the note. There  
was no evidence presented that even as servicer Respondent may or may not have a

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**SC Court of Appeals**

contractual right to foreclose on behalf of the owner. The Court should not have affirmed the grant of summary judgment in light of such undeveloped facts.

Respondent in its Return failed to address the Court's overlooking Appellants' argument that without the original note in possession of the Plaintiff, the *owner* of the note must proceed under provisions of S.C. Code § 36-3-804. Respondent did not address the Court's overlooking Appellants' argument that there was no evidence in the record that the duplicate accurately reflected the note at the time of its entry into evidence but only as of the time that the duplicate was rendered (no evidence was offered as to when the duplicate was rendered) leaving open the possibilities of any number of subsequent endorsements and transfers of ownership and that there was no evidence of authenticity of the duplicate offered below other than the bare submission to the Court by counsel. All of which leave genuine issues of material fact on which the grant of summary judgment was improper. It is not "farfetched" that the ownership of the note may have changed in the years between the rendition of the photocopy and the time of entry into evidence especially in light of the numerous corporate mergers, name changes and transfers as identified by Respondent. The Court should not have affirmed the grant of summary judgment in light of such undeveloped facts.

Respondent did not address the overlooking the absence of any evidence in the record of *delivery* of the note attending transfers as required by S.C Code §36-3-201 and 203 which require "transfer of possession". The transfer of a note requires negotiation of the note, which involves delivery of possession of the instrument and its indorsement by the holder. Absent possession of the instrument there can be no delivery; without delivery an instrument cannot be transferred. The only evidence established regarding the

note's path to Respondent was that Respondent was in possession of a copy of the note which had been rendered at some unknown time, which does not even establish that Respondent was ever in possession of the original note at any time, but only of a copy. The Court overlooked the complete lack of evidence that Respondent was either the owner of the note, the holder of the note, in possession the note, or that the note had been lost, destroyed or damaged. Without actual possession of the original note Respondent cannot be a holder. At the very least, questions of fact existed as to whether or not Respondent, admittedly not the owner of the note, was a holder or otherwise had the rights to enforce the note. The Court should not have affirmed the grant of summary judgment in light of such undeveloped facts.

Once the Court reconsiders the Appellants' arguments which it overlooked and the law and evidence which it misapprehended, the Court should determine that genuine issues of material fact exist as to the standing and original note issues and the Court should determine that the trial court's grant of summary judgment must be reversed and remanded for a full merits trial.



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Attorney for Appellants

July 19, 2013

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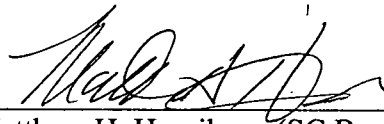
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Counsel for the Appellants, hereby certifies that a copy of Appellants' Reply to  
Return to Petition for Rehearing has been served on counsel for Respondent by regular  
U.S. mail, postage prepaid, on this 19th day of July, 2013, addressed as follows:

Dean A. Hayes, Esq.  
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