Appellate Case No. 2013-001412

HSBC Bank USA,, National Association, As Trustee of MLCC 2007-2,
Respondent,

v.

S. Russell Fielden, Deborah M. Fielden, Coastal States Bank, Defendants

Coastal States Bank, Cross-Claim Plaintiff

v.

S. Russell Fielden and Deborah M. Fielden, Cross Claim Defendants,

Of whom S. Russell Fielden and Deborah M. Fielden are the Appellants..

APPELLANT'S INITIAL BRIEF and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Master In Equity

Marvin H. Dukes III, Master In Equity For Beaufort County

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Of whom S. Russell Fielden and Deborah M. Fielden are the Appellants..

INITIAL BRIEF OF APPELLANT

Appellants

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2. Whether the Trial Court erred by granting summary judgment when the evidence provided shows the Respondent failed to establish they received legal transfer and delivery of the Appellant's note from the prior holder.

3. Whether the Trial Court erred by granting summary judgment when the evidence provided shows the Respondent failed to provide the Appellant with written notice of acceleration, the "Notice of Foreclosure" the Appellant received did not meet the strict requirements of paragraph 22 of the mortgage, and did not meet all conditions precedent for the Respondent to file the lawsuit.

4. Whether the Trial Court, based on the evidence, erred in denying the Appellant's "Motion To Dismiss" and "Counter Claim", thereby allowing the case to continue causing damages and harm to the Appellant.

Standard Of Review

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006). A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005). The appellate court, like the trial court, must view all ambiguities, conclusions, and all inferences arising in and from the evidence in a light most favorable to the non-moving party below. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001).

Additionally, "[a] legal question in an equity case receives review as in law." Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). Because questions of law may be decided with no particular deference to the trial court, this court may correct errors of law in both legal and equitable actions. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Code Ann. § 14-8-200 (Supp. 1998)).

Statement of the Case

The use of (R) denotes where the Appellant intends to refer to the "Record Of Appeal" in their final brief.

This appeal is taken from the BEAUFORT COUNTY Court of Master In Equity Court's decision to render "Summary Final Judgment" against the Appellant, the Court's subsequent decision to rule against the Appellant's "Motion To Reconsider", and sell the property at a Master's Sale.

The nature of the case was Respondent's (HSBC BANK USA, National Association, as Trustee for MLCC 2007-2) Complaint to foreclose on the residential real property owned and occupied by the Appellants (S. Russell Fielden and Deborah M. Fielden). (R)

The Appellants were informed in the foreclosure complaint that the Respondent Trust claimed ownership of their loan. (R) The Appellants had never heard of HSBC Bank. After diligently investigating the Respondent's "MLCC 2007-2" Trust documents on file with the Securities And Exchange Commission (SEC), the Appellants could not determine if their loan was part of the loan pool for the Respondent's Trust. There were conflicting claim of ownership. The Appellant's had recently been informed by mail from the original servicer of the loan, PHH Mortgage, that Merrill Lynch Credit Corporation still owned their loan. PHH Mortgage had also informed the Appellants that "Wells Fargo" was the "Investor" on the loan. (R).

Based on information provided by the PHH Mortgage, as servicer, the Appellants decided to defend the foreclosure action. Their defense was based on the Respondent's failure to provide them with proper legal foreclosure notice, the Respondent's lack of standing as the true party in interest prior to filing the foreclosure complaint, their lack of standing to currently enforce the note or mortgage as legal owner or holder, and their slander of title of the property.

On February 18, 2013, a hearing on the Respondent's Motion for Summary Final Judgment was held. The Court ruled in favor of the Respondent. The Final Summary Judgment includes reference to both a Respondent's "MERS Assignment" of the note and mortgage created after the date of the foreclosure complaint, and a copy of a non-validated "Endorsement In Blank" the Respondent created and produced over a year later in discovery. (R). A subsequent "Motion To Reconsider" was filed by the Appellant. (R). A hearing on the "Motion To Reconsider" was held on April 15, 2013 and the Court ruled against the Appellant. (R).

A sale date of the property was scheduled by the Court. The Respondent was the sole bidder on the property at the initial Master's Sale. Since a deficiency judgment was demanded, bidding was to remain open for 30 days, at which time a final Master's Sale would be held for other bidders to purchase the property at a higher price. Prior to the final sale, and prior to a receipt of a Master's Deed, the Respondent trespassed on to the property,

changed the locks, removed personal belongings of the Appellants, put the utilities in another name and put the property on the market for sale, including posting the property on the local Multiple Listing Service. The Appellants notified the Master's office of this action. The Respondent was the final bidder at the final deficiency sale two weeks later and subsequently received a Master's Deed.

Coastal States Bank was a Cross-Claim Plaintiff in the case as holder of a second mortgage on the Appellant's same property. Coastal States Bank also filed for foreclosure on the property claiming non-payment on the first mortgage jeopardized their position. Their "Motion For Summary Judgment" was heard at the same trial noted above and the Court ruled against the motion following testimony by both the Appellant and a Coastal States Bank representative confirming the fact that the Appellants had kept all payments on the Coastal States Bank second mortgage current to date.

The Defendants Russell & Deborah Fielden filed a "Notice Of Appeal" on June 12, 2013. (R).

Defendants Counsel of record, William Sloan Esq., James Scheider Esq., and Roberts Vaux Esq. were relieved as counsel for the defendants by Order of The South Carolina Court Of Appeals on August 8, 2013.

Facts

1. Some Parties had dual roles in the case;

a. Coastal States Bank, Cross-Claim Plaintiff, holds a second mortgage on the subject property in the amount of approximately $380,000 and was also the Original Lender for the first mortgage loan which is the subject of this action. Coastal States Bank represented they conveyed the first mortgage loan to Merrill Lynch Credit Corporation at the initial closing of the loan. (R).

b. PHH Mortgage was the Servicer for Merrill Lynch Credit Corp, and to whom the Appellants have always made payments. PHH Mortgage is also alleged to be the Servicer for the loans which were placed in the Respondent's securitized Trust in 2007 per the Trust's "Pooling And Servicing Agreement" (PSA) on file with the SEC. However, the PSA was never ratified to establish a servicing agreement between the Trust and PHH Mortgage. (R)

2. The facts of the case are presented in chronological order;

a) **May 17, 2006 – The note and mortgage are ratified**. The underlying subject Mortgage was signed by Appellants, S. Russell and Deborah M. Fielden as the borrower and the mortgage states that Coastal States Bank is the Lender. Coastal States Bank drafted, and

had signed, a special endorsement in the form of an "Allonge" dated the day of closing on the loan (May 17, 2006) with Merrill Lynch Credit Corporation as the "Payee". (R). The Appellants made all of their mortgage payments to PHH Mortgage as servicer for Merrill Lynch after the closing of the loan.

b) **November 19, 2007 – A second mortgage is executed.**

The Appellants and Coastal States Bank (the original lender on the first mortgage) entered into an agreement to modify an existing line of credit and sign a second mortgage on the subject property in the approximate amount of $400,000. The Appellant used most of the funds to make improvements to the subject property. The Appellants kept this second mortgage current during the entire contested foreclosure proceedings on the first mortgage. (R).

c) **January 2009 – Appellants apply for a Loan Modification for the subject first mortgage.**

The Appellants contacted PHH Mortgage, who they thought was still the servicer for Merrill Lynch Credit Corp, early in 2009 in an effort to secure a loan modification to allow them to make lower monthly payments. Negotiations lasted for over a year while they were being passed to agent after agent and required to send in duplicate financial information numerous times. The Appellants finally stopped making mortgage payments in hopes the servicer would see the need to secure

a loan modification. PHH Mortgage denied the Appellants a loan modification. (R)

d) February 22, 2010 – Appellants receive a "Notice of Foreclosure".

The Appellants received a "Notice Of Foreclosure" from PHH Mortgage on Merrill Lynch Letterhead. (R).

e) June 14, 2010 – Respondent's Foreclosure Complaint was served on the Appellants.

The Respondent filed its complaint to foreclose the subject mortgage and served the Appellants. (R). The Complaint had attached a copy of the Adjustable Rate Note which identified Coastal States Bank as the original lender. (R). The copy of the note was bare with respect to the presence of any endorsements or assignments conveying the note to any other entity beyond Coastal States Bank.

f) August 13, 2010 – The Respondent prepared and filed a "MERS Assignment" of the note and mortgage.

After the date of the foreclosure complaint, with the assistance of their counsel, the Respondent had a "note and mortgage assignment" (from MERS to the Respondent) prepared and recorded in the Beaufort County Register Of Deeds. (R). This assignment is still on record with Beaufort County.

g) The Appellants investigated the Trust Documents.

After being served the foreclosure complaint from a bank the Appellants had never heard of, the Appellants learned the Respondent was a Trustee of a New York Trust. The Appellants investigated the Trust documents to see if there was any evidence their loan had been made a part of the Respondent's Trust. They found no such evidence. Since the Appellants had been recently informed by PHH Mortgage that Merrill Lynch Corporation still held their note and mortgage, they felt compelled to contest the foreclosure action by the Respondent.

h) **November 24, 2010 - The Appellant filed an "Answer and Counterclaim".**

An "Answer and Counterclaim" to the Complaint was filed by the Appellant's counsel William H. Sloan , Esq. which included several equitable defenses. (R).

Argument

1. The Respondent did not give the Appellant legal "Notice Of Foreclosure"

a) The "Notice Of Foreclosure" the Appellants received was not originated or legally authorized by the Respondent.

The "Notice Of Foreclosure" the Appellant received by mail was from PHH Mortgage on Merrill Lynch Letterhead with no mention of the Respondent, the Trust "MLCC 2007-2", did not contain any authorization by the Respondent to allow PHH Mortgage to mail the foreclosure notice on their behalf. (R). Once the Appellants received the "Notice Of Foreclosure", the Appellants assumed that Merrill Lynch was preparing to foreclose on the property. In the lower court, Judge Dukes seemed to agree the notice came from Merrill Lynch and not the Respondent. When Judge Dukes looked at the "Notice Of Foreclosure" he stated on record "it appears to be from Merrill Lynch". (R).

b) The "Notice Of Foreclosure" does not match the requirements in paragraph 22 of the Appellant's Mortgage.

The "Notice Of Foreclosure" the Appellant received includes an additional statement that states the Appellants "have a right to bring a court action to assert the nonexistence of a default". This would require an affirmative action

by the Appellant, and if acted upon, would have created a financial burden on the Appellant. This statement is not in the Appellant's mortgage. This argument was raised by the Appellant's counsel at trial and in the Appellant's "Motion To Reconsider" as the notice failed to comply with the Mortgage, and therefore did not meet the condition precedent needed to give the Appellant proper notice. (R). In a case before the Circuit Court for Broward County Florida, the language in paragraph 22 of the mortgage and the "Notice of Foreclosure" conflict was identical to the issue in the Appellant's case. Bank Of America NA. Versus Tyron Casey and Margarita Casey. CASE NO.: CACE12003317. The Court stated "*In the most fundamental sense there is a world of difference between having to bring a court action to assert the non existence of a default or any other defense to acceleration and the right to assert in the foreclosure proceeding the non existence of a default or any other defense to acceleration. The former requires affirmative action on the part of the borrower to file a complaint, which almost all are ill equipped to do, or pay an attorney to do so. It also requires the payment of a filing fee at a time when the borrower is least capable of doing so. It is significantly different from taking no action, waiting until the foreclosure proceeding is filed and then asserting why acceleration is not correct or specifying other defenses. To equate the two is to ignore both the terms of plaintiff's mortgage and the economic burden of the substituted language.*" The Court ruled the notice was invalid and stated "*The court does not believe that it should rewrite the parties agreement to permit or to accept the notice that was provided.*"

c) The original servicer represented Merrill Lynch Credit Corporation still owned the Appellants note and mortgage after the Respondent's Trust was formed.

Representation by the Servicer.

PHH Mortgage, acting as servicer for Merrill Lynch Credit Corporation on the first mortgage, accepted all payments the Appellant made during the first years of the loan. They did not notify the Appellant of any change in ownership of the note or mortgage. The Appellant testified at trial they made a request to PHH Mortgage in 2009, during their loan modification request period, for PHH Mortgage to send them proof of ownership of the note and mortgage. The appellant testified at trial that PHH Mortgage, in response to their request, sent them a copy of the note and mortgage and a copy of an "Allonge" in the form of a special endorsement, dated the day of the original loan closing, from Coastal States Bank to Merrill Lynch Credit Corporation. The documentation PHH Mortgage sent to the Appellant, two years after the Respondent's Trust was formed, was void of any information showing any change of ownership of the Appellants loan beyond Merrill Lynch Credit Corporation. (R). This was a clear misrepresentation if the loan had been conveyed to the Respondent's Trust two years earlier in 2007.

d) **The Respondent filed a "Limited Power Of Attorney" almost two years after the date of the foreclosure action in an attempt to validate the "Notice Of Foreclosure".**

The Respondent's counsel represented at trial that the "Notice Of Foreclosure" was presented on behalf of the Respondent by their purported servicer PHH Mortgage under a "Limited Power Of Attorney". (R) However, the "Limited Power Of Attorney" the Respondent's counsel referred to is dated April 6, 2012, two years after the "Notice Of Foreclosure" was mailed to the Appellants. (R).

2. The Respondent was not the legal owner or holder of Appellant's Note and Mortgage prior to the date of their foreclosure action.

a) The Respondent failed to provide evidence of a transfer or delivery of the Appellant's note and mortgage to the Respondent prior to their foreclosure complaint.

The Respondent contends that its standing to foreclose derives from possession of the Note and Mortgage and an endorsement of the note. The Respondent failed to show evidence that the Trustee received physical delivery of the Note and Mortgage and or the endorsement prior to the inception of the lawsuit. PHH Mortgage as servicer for Merrill Lynch was in possession of the Note and Mortgage during the first year of the loan. The

Respondent did not offer any evidence to prove that the Note and Mortgage was delivered to them by PHH Mortgage, who according to the Respondent's counsel, always held the original note and mortgage. The original note and mortgage should have been delivered to the Trustee or their Custodian (which was the Chief Administrator / Master Servicer of the Trust, and not the Servicer, as required by the Trust Documents). There was also no evidence shown that PHH Mortgage had the authorization to act as servicer for the Respondent's Trust other than a "Power of Attorney" that was produced by the Respondent over two years after the foreclosure complaint. The Trust documents were never ratified as needed to give PHH Mortgage the legal ability to act as Servicer for the Respondent Trust. Only the owner of both the note and mortgage at the time of the commencement of the action may seek the remedy of foreclosure. Where a plaintiff is the assignee of the mortgage and the underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action. "[F]foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity." The Appellate Division, First Department, citing Kluge v Fugazy (Katz v East-Ville Realty Co., 249 AD2d 243, 672 N.Y.S.2d 308 [1st Dept 1998]) instructed that "[p] Defendant's attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without fact."

For the Respondent to be entitled to summary judgment, it must show, without genuine issue of material fact, that it was the legal holder of the note

on the date the complaint was filed. The Respondent was acting as a trustee in the foreclosure action for an entity not named in either the Appellant's mortgage or note. The note and mortgage on the property, which is the subject of this action, shows the Payee to be a Lender other than the Respondent.

The complaint alleged that the Respondent is the owner and holder of the note and mortgage. The complaint failed to plead a single material fact substantiating that the Respondent, prior to filing its lawsuit, acquired the subject note and mortgage through an equitable or physical transfer. The complaint had attached, a copy of the Adjustable Rate Note, which identified Coastal States Bank as the lender. (R). The copy of the Note was bare with respect to the presence of an endorsement. (R). .....(The record's evidence is insufficient to demonstrate the Plaintiff had standing to foreclose at the time the lawsuit was filed.... See U.S. Bank Nat'l Ass'n v. Kimball, 27 A.3d 1087 (Vt. 2011) (bank that filed a foreclosure complaint against a homeowner did not show that, at the time it filed the complaint, the bank possessed the original promissory note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to the bank; although the bank ultimately submitted the promissory note with an undated specific endorsement to the bank, the bank provided no information as to when such endorsement was made).. Without an interest in the promissory note, or without evidence of authority to

enforce the promissory note against Appellant, Respondent had no standing to foreclose and summary judgment was improper).

The Respondent created an undated, unverified "Endorsement In Blank" and produced it in discovery two years after they filed the foreclosure action. The non-validated copy of an endorsement did not establish the Respondent had the right to enforce the note when it filed suit.

3. The Respondent did not provide sufficient evidence they are the legal holder or owner of the Appellant's Note and Mortgage.

a) No Respondent's Trust Documents were offered as evidence by the Respondent to prove ownership of the Appellant's Note and Mortgage.

Testimony given on record by the Respondent's witness at trial, as an officer with the Trust's purported servicer PHH Mortgage, confirmed the fact that the PSA is the "guidebook" and "operating document" for the Trust. (R). Even though the Trust's "controlling document", the PSA, called for a "Loan Schedule" to show the loans to be transferred to the Trust and a "Loan Sale Agreement" for each loan to be included in the Trust, the Respondent did not offer such evidence during the three years of the case. (R). There is also no evidence the Appellant's loan was made a part of the Respondent's Trust on file with the SEC.

The Respondent chose to not offer the lower Court any evidence in the form of trust documents to show the Appellant's mortgage and note were transferred and made a part of the loan pool for the MLCC 2007-2 Trust in 2007. When asked, under cross examination by the Appellant's Counsel, "*is the Appellant's loan part of the Respondent's Trust?*", the Respondent's witness from PHH Mortgage, as purported Servicer, would not confirm under testimony that the Appellant's Note and Mortgage were a part of the Respondent's Trust. (R).

The Respondent argued that the Appellant is not a party entitled to enforce the terms of the PSA. The Appellant is not complaining about breaches of the PSA for purposes of enforcing the PSA contract to which they are not a party, but to point out that the PSA was both not ratified in order to prove PHH Mortgage was a legal servicer for the Trust and the PSA does not show the Appellant's loan is in the Respondent's Trust. The Respondent chose to not use the Trust's documents in the foreclosure process to show ownership of the Appellant's note and mortgage. The Respondent, instead, chose to use a late "robo-signed" MERS assignment of the mortgage and note, a "altered allonge" they produced, and a copy of an undated, non-affixed, non-validated "Endorsement In Blank" which could have been prepared by anyone with a copier after the Trust closing date of May 31, 2007. (R).

b) The Respondent's late "MERS Assignment" did not legally convey the note to the Respondent.

The "MERS Assignment" the Respondent created after the date of their foreclosure complaint purports to assign the note and mortgage. This late assignment was identified and exposed as fraudulent to the Court by the Appellant in a hearing on March 29, 2011, just a few months after the case began. (R). The Respondent's counsel did not dispute the Appellant's allegation of fraud in that the document was notarized in Florida and not in the presence of the signer of the document who works in New Jersey. The signer of the document was named as a "Vice President" Of MERS (the assignor) who is also an employee of the purported servicer and works in New Jersey at PHH Headquarters. If PHH mortgage is a servicer for the Trust, then their employee basically attempted to assign the mortgage to the Trust they are supposed to be servicer for. The Respondent's counsel admitted their law firm's involvement in preparing the fraudulent document. When asked on record by the Appellant's counsel if the document originated from their firm, Respondent's counsel's answer was "yes". (R). This late fraudulent "MERS assignment" was submitted in Court in the first hearing by the Respondent's counsel in an attempt to barr the Appellants from further presenting their case in court and to deprive them of their opportunity to be heard. The Respondent's counsel admitted that they prepared the "MERS assignment" after the date

of the foreclosure action and they had it filed with the Beaufort County Register Of Deeds. This action should be construed as extrinsic fraud. (R).

The MERS assignment prepared and filed with the Beaufort County Register of Deeds by the Respondent's counsel after filing the foreclosure action attempts to assign the note as well as the mortgage. MERS was not named on the note, had no interest in the note, and therefore could not assign the note. This argument was part of the Appellant's "Motion To Dismiss". (R).

"[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but . . . the assignment of the mortgage alone does not carry with it an assignment of the note." Hahn v. Smith, 157 S.C. 157, 167, 154 S.E. 112, 115 (1930). (R).

"Where the mortgagee has "transferred" only the mortgage, the transaction is a nullity and his "assignee" having no interest in the underlying debt or obligation, has a worthless piece of paper (4 Richard R. Powell), Powell on Real Property, § 37.27 [2[(2000).

c) The Respondent failed to provide sufficient evidence they had the right to enforce the Appellant's note and mortgage.

Appellant's goal and objective has been to determine the proper ownership of Appellant's loan and to negotiate with the "party entitled to enforce" the provisions of the note and mortgage. It is the

Appellant's assertion that neither the Respondent nor the MLLC 2007-2 Trust demonstrated the loan was part of the Trust, that the Trust received the Appellant's payments, that they had the right to enforce or negotiate a modification of Appellant's loan, or proved the requisite "Standing" to bring a foreclosure action under Appellant's mortgage. The Appellants informed the Lower Court early in this case of their concerns about recent fraud and misrepresentations they have read about in the Banking industry. There is currently a fraudulent "robo-signed" "MERS Assignment" recorded in Beaufort County Register Of Deeds, the MERS "tracking system" shows "Wells Fargo Home Mortgage" is involved in their loan. Another entity named as "Wells Fargo" is purported to be the "Investor" according to PHH Mortgage, and there are no valid Trust documents that prove the loan is in the Trust. The Appellants cannot be assured they are completely risk free against any damage or cost involved in future claims involving their loan. With conflicting records of ownership of the Appellant's Note or Mortgage, future litigation is possible, and could negatively affect or delay the sale of the property if any such legal action is filed with the Courts.

d) The Lower Court erred in using the Respondent's copy of an undated and unverified "Endorsement In Blank" prepared by purported servicer to support summary judgment in favor of the respondent.

In a hearing on March 29, 2011 the Appellant, on record, made the lower court aware of a recent HSBC (The Respondent Bank acting as Trustee in this case) 10K Report filed with the Securities And Exchange Commission. The Appellant read part of the report to the Court. (R). Below is part of the HSBC report on the Court record;

> "*State and federal officials are investigating the procedures followed by mortgage servicing companies and banks, including HSBC Finance Corporation and certain of our affiliates, relating to foreclosures. We and our affiliates have responded to all related inquiries and cooperated with all applicable investigations, including a joint examination by staffs of the Federal Reserve and the OCC as part of their broad horizontal review of industry foreclosure practices. Following the examination, the Federal Reserve issued a supervisory letter to HSBC Finance Corporation and HSBC North America noting certain deficiencies in the processing, preparation and signing of affidavits and other documents supporting foreclosures and in governance of and resources devoted to our foreclosure processes, including the evaluation and monitoring of third party law firms retained to effect our foreclosures.*" (R).

The "Endorsement In Blank" referred to in the summary judgment was not filed with the Respondent's complaint in 2010. It was presented two years later in discovery. The same non-validated "Endorsement In Blank" is a copy and does not meet the standard for

self-authentication under Rule 902 SCRCP, Self-Authentication, (Certain documents would tend to be self-authenticating. Other documents which are not self-authenticating would only be admissible when presented with the authentication of a qualified foundation witness.) There was no personal knowledge presented by a witness, or was an affidavit attached to the copy of the "Endorsement In Blank", to authenticate the document and the signature. This endorsement, the Respondent produced two years after the foreclosure complaint, is referred to in the lower Court's "Final Summary Judgment" and was a key document used in the lower Court's decision. (R). The Respondent had already shown they were capable of creating and altering documents (Namely the "robo-signed""MERS Assignement", which was a fraudulently notarized assignment of both the note and mortgage, and the "altered allonge" belonging to Coastal States Bank). Both of these documents were created by the Respondent in an attempt to convince the court of ownership of the note and mortgage. Therefore, there is a legitimate reason to question the veracity of this copy of the "Endorsement In Blank". This third document could have easily been created in advance of the trial by anyone with a word processor and a copier. The signature appears to an electronic signature. The fact the endorsement was not dated or notarized was raised by the Appellant. The Court did not bother to ask the Respondent to confirm the date endorsement occurred. The Judge in the lower court erred in his

discretion by relying on an unverified, undated, copy of a document to establish the ownership of the Appellant's Note and Mortgage after the complaint was filed.

e) There is evidence of numerous conflicting ownership claims of the Appellant's note and mortgage.

There are two parties to this action that informed the Appellant "Wells Fargo" has an interest in their loan. The Appellant testified at trial that in 2009 a representative with PHH Mortgage told them that "Wells Fargo" was the "Investor" on their note and mortgage. (R). The Appellant also testified at trial that the MERS mortgage tracking website currently shows the "Investor" of the Appellant's mortgage is "Wells Fargo Home Mortgage". (R). The MERS system tracks changes of ownership in mortgages and other actions involving the loans of their members. Since "Well Fargo Home Mortgage" is listed as the "Investor" with MERS, then there was likely a transfer of the Appellant's note at some point they may have an interest in the Appellant's mortgage and note. Evidence was produced in discovery by the Respondent in the form of a MERS "Milestone" report which tracked changes in the rights to the Appellant's Note and Mortgage as well as changes in servicers. Shown in the MERS report are transfers of the beneficial rights to the loan, the servicing rights, and the foreclosure assignment of the foreclosure action of the Appellant's

loan. All of these actions in the MERS report are dated after the foreclosure action was filed. The MERS report shows there was involvement of "Wells Fargo Home Mortgage" in their note and mortgage and a transfer of servicing rights occurring after the foreclosure complaint was filed. (R).

f) The Respondent's late copy of an "Endorsement In Blank" by Merrill Lynch Corporation was invalid and conveyed nothing.

The copy of an "Endorsement In Blank" the Respondent produced two years after filing for foreclosure was not part of the Trust Agreement (The PSA), it is a copy, and is not dated or verified by a witness. The Respondent's Trust documents do appear to attempt to involve some Merrill Lynch Loans as Merrill Lynch Credit Corporation is named in the Trust documents. The appellant has studied the Trust agreement and found Merrill Lynch Credit Corp., who is shown as the "Endorsor" on the "Endorsement In Blank", which was submitted to the lower Court, was also the (A) player in the securitization process in the Respondent's Trust for whatever loans actually were made a part of the loan pool. If the Appellants loan was a part of the loan pool, the Trust documents show Merrill Lynch Credit Corp. would have already sold and transferred the note and mortgage to Merrill Lynch Mortgage lending Inc. (the (B) player) and they in turn would have sold and transferred the loan to Merrill Lynch

Mortgage Investors Inc. (the (C) player). That is why these two entities claimed ownership as stated in the first page of the PSA. After the Trust was formed, if the subject loan was made a part of the Trust, Merrill Lynch Credit Corp could no longer claim ownership in the note and mortgage and therefore had nothing, and no reason to, endorse anything. The Respondent's unverified and undated copy of an "Endorsement In Blank" from Merrill Lynch Credit Corp conveyed nothing and was produced by PHH Mortgage in an attempt to convince the Court that Merrill Lynch Credit Corp. had something to convey. Merrill Lynch Credit Corp. had nothing left to convey regarding any loans after the Trust was formed and the copy of the "Endorsement In Blank" PHH Mortgage created after the foreclosure action began conveyed nothing. The Respondent claimed they were the owners of the note and mortgage at the time they filed suit, therefore they contend that the subject loan was intended to be part of the loan pool of mortgages referred to in the Trust documents. If their claim is correct, then claims of ownership of the loan by two other entities, as stated above and in the Trust documents, are subsequent to Merrill Lynch Credit Corp's ownership. These claims of ownership of the loan by others are still on public record with the Securities And Exchange Commission. The final loan sale and endorsement was never completed and ratified per the terms of the PSA by Merrill Lynch Mortgage Investors Inc. (the (C) player) as the legal "Depositor" of the loans to the Respondent's Trust. If the subject loan was intended to be part of the Trust in 2007, the above

explanation is the reason the Respondent did not use the PSA as evidence to show their ownership of the loan in 2007 and they are attempting to use the faulty "Endorsement In Blank" to convey the loan to a Trust that closed years ago. The Trust documents do not allow for a loan to be conveyed to the Trust after the Trust's closing date. The lower Court ignored this fact.

g) The Respondent did not receive the Appellant's Mortgage Payments prior to filing their foreclosure.

The Appellant always assumed their payments during the first year of the loan went to Merrill Lynch Credit Corporation as that was the entity named as payee on the special endorsement from the initial lender Coastal States Bank. The Respondent did not show any evidence to the Court that the flow of payments made by the Appellants was ever changed from Merrill Lynch Credit Corporation in 2007 to another entity and certainly not to the subject Trust MLCC 2007-2 when it was formed. The Respondent showed evidence that proves just the opposite. The Respondent presented the Court with evidence, in their exhibit number six at trial, that all of the payments made to PHH Mortgage were still being received by Merrill Lynch for two years after the Trust was formed. (R). PHH Mortgage was the servicer for the Merrill Lynch Credit Corporation at the beginning of the loan in 2006. The Respondent did provide evidence at trial that PHH Mortgage kept account of the payments made to them by the Appellant. The Respondent had an employee of PHH Mortgage testify at trial that the loan activity accounting presented in Plaintiff's exhibit (#6) was

accurate. However, in the same exhibit (#6) there was also a "Loan Activity Information" page (the last page of the 79 page exhibit) which showed Merrill Lynch continued to receive the payments after the Trust MLCC 2007-2 was formed. (R). Because the Respondent did not have a financial interest in any of the payments they were not the party entitled to receive a distribution from the foreclosure at the time of the complaint, and therefore did not have standing to foreclose on the property.

h) The Lower Court erred when it ignored the fact that the Respondent's "MERS Assignment" was created, filed and recorded after the date of their complaint, and erred when it used the same assignment to support the Court's summary judgment.

. The late "MERS Assignment", along with the note and mortgage, were submitted to the lower court by the Responent during the very first hearing to prove standing. This late assignment was identified and exposed as fraudulent to the Court by the Appellant in a hearing on March 29, 2011, just a few months after the case began. (R). The Respondent's counsel did not dispute the Appellant's allegation of fraud in that the document was notarized in Florida and not in the presence of the signer of the document who works in New Jersey. The signer of the document was named as a "Vice President" Of MERS (the assignor) who is also an employee of the purported servicer and works in New Jersey at PHH

Headquarters. If PHH mortgage is a servicer for the Trust, then their employee basically attempted to assign the mortgage to the Trust they are supposed to be servicer for. The Respondent's counsel admitted their law firm's involvement in preparing the fraudulent document. When asked on record by the Appellant's counsel if the document originated from their firm, Respondent's counsel's answer was "yes". (R). This late fraudulent "MERS assignment" was submitted in Court in the first hearing by the Respondent's counsel in an attempt to barr the Appellants from further presenting their case in court and to deprive them of their opportunity to be heard. The Respondent's counsel admitted that they prepared the "MERS assignment" after the date of the foreclosure action and they had it filed with the Beaufort County Register Of Deeds. This action should be construed as extrinsic fraud. (R).

i) **The lower Court erred when it ignored the Respondent's fraudulent "alteration" of a "Special Endorsement" owned by Coastal States Bank and used the "altered allonge" to claim ownership of the Appellant's note.**

This "altered allonge" which was produced by the Respondent in discovery was part of Appellant's trial exhibit #2 not marked and submitted as Appellant's Exhibit #1 in "The Motion To Reconsider". The Respondent's counsel represented on record that this "altered allonge" was attached and made part of the Note. (R). SC Code Of Laws SECTION 36-

3-203 (b) states "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument". Altering the existing allonge document owned by Coastal States Bank is a forgery, the alteration is "material," and used to affect a legal right. This change to the Allonge made by the Respondent affects the legal rights or obligations of the Appellant. SC Code of Laws SECTION 36-3-407. Alteration. (a) "Alteration" means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party. (b) Except as provided in Subsection (c), an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms". The Lower Court erred in not taking action against the Respondent and dismissing the case based of the fraudulent altercation of the Allonge by the Respondent.

j) PHH Mortgage provided the Respondent's counsel with the original note and mortgage but had no servicer authorization from the Respondent.

If PHH Mortgage supplied the Respondent's counsel with the Note and Mortgage they were able to do so because they held the note and mortgage for Merrill Lynch Credit Corporation who was the original lender the Appellants made payments to. The original note and mortgage was never delivered to the Respondent.

4. The Lower Court's decision to deny the Appellant's "Counter Claim" and "Motion To Dismiss" affected the marketability of the Appellants property.

a) The Appellant's Answer and Counterclaim were valid.

The Appellant filed an answer to the Respondents complaint which also contained a counterclaim. (R). The Appellant's counterclaim contained a "Motion To Dismiss" and was based on the fact that the Respondent's did not show ownership of the note at the time they filed for foreclosure, the "MERS Assignment" they filed after the foreclosure date was not valid, and it fraudulently attempted to convey the note.

MERS does not have the authority to assign the mortgage. They are merely the record keeper of who actually owns the mortgage. Either way, there is nothing that gives them the authority to assign the note.

b) Relief could have been granted early in the case to avoid damages to the Appellant.

The issue of whether the Respondent's actions regarding the "MERS Assignment" caused marketable title issues was raised by the Appellant in a hearing on March 28, 2011. (R).

The Appellants are both South Carolina licensed real estate agents. They own a Real Estate Brokerage in Beaufort, SC. Russell Fielden is Broker-In-Charge. As licensed Realtors they and their Real Estate agency are at a greater exposure to disclosure issues than the average homeowner.

The Appellant's brokerage had the subject property on the market for sale, as the listing agency, at the beginning of the foreclosure process. Mr. Fielden (co Appellant), as a licensed SC Broker-In-Charge, became concerned that, based on his discovery and knowledge of title issues in the case, there may be disclosure issues he needed to address. Mr. Fielden was aware there were no Trust Documents evidencing the loan was a part of the loan pool for the Respondent's Trust and there was a fraudulent "MERS Assignment" recorded in the Beaufort County Register of Deeds purported to assign the mortgage and the note to a Trust that had closed years ago. Mr. Fielden felt he needed to address the issues regarding the "MERS Assignment", the fact that the title to the note was in question since MERS has no authority to assign the note, and the issue was being litigated. Mr. Fielden became concerned that the SC Property Disclosure laws he and his agency are bound to may affect the marketability of their home and the fact that the "South Carolina Real Estate Association" sales contract calls for the seller to convey "marketable title". Mr. Fielden

contacted Byron King who is legal Counsel for the SC Realtor's Association and asked his opinion regarding whether or not he should disclose any known potential title defects currently in litigation. Below is part of Byron King's answer to Mr. Fielden;

"SCR recommends to listing brokerages that they persuade sellers to disclose issues. This protects both the listing brokerage and seller from lawsuits later. So, it is in everyone's best interest long term for seller to disclose. No buyer misrepresentation lawsuit can be successful if disclosure of the issue is made. Certainly the buyer or their title insurer is capable of suing the seller and your brokerage if not disclosed and the buyer is damaged. In your situation, the LLR seller disclosure is ideal for disclosure of known title defects"

Mr. King referred to Virginia Real Estate Commission v. Bias, 226 VA. 264,308,S.E.2d 123,125-26 (1983) (a broker's duties include "an obligation to disclose to the principal all facts within his knowledge which are or may be material, or which might influence the principal in deciding a course of action.).

After receiving Mr. King's legal advice, Mr. Fielden added the proper disclosure to his SC Property Disclosure, put it back in his file, and took the property off the market. The marketability of the title to the property was in question and would therefore affect the marketability and value of the property on the open market.

For reasons stated above, the Appellants request the Master's grant of summary judgment be reversed, the sale vacated, and the case dismissed with prejudice.

Request For Oral Argument

We certify this document is 40 pages with cover and 8,597 words.

Respectfully submitted,

Appellants

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Date 9/6/13

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Master In Equity

Marvin H. Dukes III, Master In Equity For Beaufort County

Appellate Case No. 2013-001412

HSBC Bank USA,, National Association, As Trustee of MLCC 2007-2,
Respondent,

v.

S. Russell Fielden, Deborah M. Fielden, Coastal States Bank, Defendants

Coastal States Bank, Cross-Claim Plaintiff

v.

S. Russell Fielden and Deborah M. Fielden, Cross Claim Defendants,

Of whom S. Russell Fielden and Deborah M. Fielden are the Appellants..

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1) Lower Court's Order of September 1, 2000; All pages.
2) Lower Court's Order of December 1, 1990; All pages.
3) Respondent's Complaint; All pages.
4) Appellant's Answers, Counterclaims & Motions to Dismiss: All pages
5) Transcript of Hearing Proceedings March 28, 2011; pp. 12-28, 37-55, 72, 75-84.
6) Transcript of Hearing Proceedings on February 18, 2013; All pages and exhibits.
7) Transcript of "Motion To Reconsider" Hearing on April 15, 2013; All pages and exhibits.
8) A portion of the Pooling And Servicing agreement for the Trust pp. 1, 11, 35, 37, Exhibit E – Mortgage Loan Sale Agreement. Exhibit A – Mortgage Loan Schedule.
9) The MERS Milestone Report

I certify that this designation contains no matter which is irrelevant to this appeal.

September 6, 2013

Appellants

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APPEAL FROM BEAUFORT COUNTY
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v.

S. Russell Fielden, Deborah M. Fielden, Coastal States Bank, Defendants

Coastal States Bank, Cross-Claim Plaintiff

v.

S. Russell Fielden and Deborah M. Fielden, Cross Claim Defendants,

Of whom S. Russell Fielden and Deborah M. Fielden are the Appellants.

Proof Of Service

I certify that I have served the enclosed Appellant's Initial Brief and Designation Of Matter on the following Counsel of record on the above captioned case by depositing a signed copy of brief in the United States Mail, postage prepaid, on September 6, 2013, addressed to ;

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September 6, 2013

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