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SC Court of Appeals

In the S. C. Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
2017CP2308016

Perry H. Gravely, Circuit Court Judge
Charles B. Simmons, Jr., Master in Equity Judge

Case No. 2024-002207

Wells Fargo Bank, N. A. Plaintiff – Respondent

v.

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

Of Whom Michelle Hodges, in her Individual capacity,
is the Appellant.

REPLY BRIEF OF APPELLANT

Hodges

Harris Dr.

Simpsonville, SC 29681

864-692-3748

Appellant Pro Se

Michelle

6 Young

Wells Fargo's Counsel

Mr. S. Sterling Laney, III, Esquire

Mr. Jason D. Wyman

Womble Bond Dickinson

550 South Main ST
#400
Greenville, SC 29601

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REPLY TO RESPONDENT'S COUNTER STATEMENT OF THE CASE

Wells Fargo's misstates that this appeal of the December 12, 2024 final Order of Judgment of Foreclosure and Sales is a collateral attack on final rulings, when this is a direct appeal of the stated Order and Judgment (Response Brief, p. __, Lines __). Further, the Respondent largely attempts to reframe the issues and prejudices raised in Appellant's operative brief, as an

imposition on Wells Fargo to address dismissed counterclaims, rejected defenses and to relitigate matters already decided. The Respondent further invokes several procedural doctrines claiming that this appeal is limited but does not explain what doctrine limits what issue, nor does Wells Fargo explain to the Court what issues were already decided. This Appeal does not impose on Wells Fargo to relitigate previously decided issues but points out among other issues that there is a gap in the previous rulings that Wells Fargo was in possession of the original note with the substantive right to enforce the note and the evidence establishing whether Wells Fargo had that right at the time the complaint was filed. Fargo had the substantive right to enforce the note at the time the complaint was filed, since the prior rulings held that it was in possession of the original note. Further, Respondent's procedural arguments consequently do not resolve the evidentiary and legal errors identified in Appellant's opening brief.

I. RESPONDENT'S THRESHOLD STATEMENT OF ISSUE NUMBER 1

Whether this appeal is limited to the December 12, 2024 Order of Judgment of Foreclosure and Sale and the evidence admitted at the final foreclosure hearing, rather than issues resolved by the prior summary judgment order affirmed on appeal.

A. APPELLANT'S REPLY TO RESPONDENT'S ISSUE NUMBER I

Under Wells Fargo's Issue I, it invokes "scope" as the problem with this appeal but argues law of the case., (Brief at p. 5). Additionally under its Standard of Review section, Respondent discusses preservation and finality (Brief at pp. 3-4). Appellant addresses the following procedural doctrines below: Scope of Review, Standard of Review, Preservation, Law-of-the-case and Finality.

1. Scope of Review

a. The scope of review is under S. C. Code § 14-3-320, which provides, "The Supreme Court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review

the findings of fact as well as the law, except in chancery cases when the facts are settled by a jury and the verdict not set aside....". And S. C. Code § 14-8-200(a) provides, "The Court of Appeals applies the same scope of review as the Supreme Court would apply in a similar case".

b. All issues raised in this appeal are questions of law, which fall within the scope of appellate review. Even if appellant presented questions of fact; which she did not; such issues would still fall within appellate scope. Wells Fargo invokes scope of review but never argues it. This bare invocation does not resolve any issues raised on appeal, nor does it show any support for the Master in Equity's final order dated December 12, 2024. Accordingly, Wells Fargo's invocation of scope fails and should be rejected.

2. STANDARD OF REVIEW

a. Under its standard of review Wells Fargo cites that, "a mortgage foreclosure is an action in equity". *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). (Brief at 3).

Respondent's standard of review discussion addresses factual findings and the standard applicable to them. However, the issues raised by Appellant in this appeal are all questions of law, not factual findings and in an equitable action, questions of law are reviewed de novo and without deference to the lower court. See *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). "[a] legal question in an equity case receives review as in law." See also *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) "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. (citing S.C. Code Ann. § 14-8-200 (Supp. 1998)).

b. Additionally, under its standard of review, Wells Fargo makes a reference to Preservation,

Finality and Appellant's burden (Resp. Br., ___). However, the principles of Preservation and Finality and Appellant's burden, do not alter the applicable standard of review and Wells Fargo has not explained how Preservation, Finality and Appellant's burden. affect the standard of review, or how the those procedural doctrines and burden of proof, apply to the issues raised in this appeal, nor how these support or detract from the Master-In-Equity's Final Order. Therefore, Wells Fargo's assertion of Preservation, Finality and Appellant's burden fails as to how it affects the Standard of Review and should be rejected.

c. Appellant acknowledges her burden to demonstrate error and prejudice. However this burden applies to the legal questions properly before this court, which receive de novo review without deference to the trial court.

3. PRESERVATION

Respond refers to preservation under Standard of Review as limiting appellate review, but does not explain what issue or issues in this appeal that are not preserved or how the doctrine of preservation resolves any issues raised in this appeal or how it supports any of the rulings in the Master in Equity's final Order.

a. The following issues are preserved for appellant review:

a. COMPLAINT - Issue Standing

The Complaint in this action was filed on December 22, 2017 and states,
"Plaintiff
Mortgage
has the legal right to enforce the negotiable instrument secured by the
and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil procedure. (R. Compl., p. 1, ¶ 3). The Complaint was not notarized

b. SIXTH AMENDED ANSWER

Appellant's Sixth Amended Answer filed on July 30, 2018 states, Further
deny
that the Plaintiff has the right to enforce the Note, as the plaintiff did not
attach

a copy of the Note to the complaint demonstrating that it was the holder of the Note at the time of filing the complaint. (R. Sixth A.A., p. 2, ¶ 3)

c. MOTION FOR SUMMARY JUDGMENT

1. Issue - Standing

Wells Fargo's motion for Summary Judgment, was filed on June 10, 2019,

Counsel argued that Wells Fargo was in possession of the original note, endorsed in blank with the right to enforce, citing S. C. Code Ann. §§ 36-3-205(b), 36-3-301, and 36-3-201 (R. M.S.J., p. 5, item 3).

2. Issue - Foreclosure Intervention

(Chief Justice Toal's Administrative Order 2011—OS-02—01 "does not mandate foreclosure assistance be provided to all foreclosure defendants." It merely provides procedures intended to ensure that lender-servicer and mortgagor have the opportunity to pursue a loan modification or other loss mitigation "where possible."); (Hodges Dep. Tr. 47:12-48:10.) The motion contained no affidavit and the note was not notarized.

d. MEMORANDUM IN OPPOSITION TO M.S.J.

On July 12, 2019, Appellant filed a notarized Memorandum in Opposition (based on personal knowledge) to Wells Fargo's msj, stating, "Plaintiff's motion for summary judgment as to the Defendant's Affirmative Defense for Lack of Standing, remains a disputed material fact and therefore summary judgment should be denied. The Complaint is void of any claims or an attachment of a copy demonstrating that the Plaintiff is in possession of the original note. "I requested to see the original and via appointment and on 9/12/2018 and on 5/23/2019 during the deposition, Mr. Laney requested that I look at a Note that he purported to be the original and I again found that Mr. Laney was not in possession of the original." Plaintiff claimed to be the owner of the debt via a letter dated April 28, 2012. The Mortgage was assigned on January 17, 2017 without any mention of the note being transferred, which would make the note a nullity due to bifurcation. These issues raise a material fact regarding plaintiff's standing to initiate foreclosure. (R. Memo in Opp., p. 7, item 3 - p. 8, l. 1-2) This Memo is an affidavit based on personal knowledge

e. DEPOSITION TRANSCRIPT

On May 23, 2019 Wells Fargo deposed and Wells Fargo attached a copy of various deposition pages. Appellant stated that she is waiting for Wells Fargo to provide a copy of the Pooling and Servicing Agreement. Mr. Laney states he is counsel for Wells Fargo and there is no pooling and servicing agreement. (R.Dep. Tr., p.

f. WELLS FARGO'S REPLY IN SUPPORT OF SUM. JUDGMENT

1. Issue - Time being loan servicer

On July 18, 2019, Wells Fargo filed its Reply in Support of Summary Judgment.

While addressing Appellant's counterclaim under the Fair Debt Collection Practices Act (FDCPA) Respondent stated, "Wells Fargo was at the very least the loan servicer prior to the loan being in default. (R. Reply In Supp of Sum Judgment, p. 17)

It is well-established that a loan servicer (**NOT AVAILABLE**) has standing in a mortgage foreclosure action. *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 224, 746 S.E.2d 478, 483 (Ct. App. 2013). Defendant testified at her deposition that payments were made to Wells Fargo and that she applied directly with Wells Fargo for a loan modification. (See Hodges Dep. Tr. 45:2-5, 86:5-15.)

Defendant admits as much by the fact that she applied for assistance directly with

Wells Fargo before the loan was put in default. (See Hodges Dep. 45:4-6; 47:5-11 and Complaint at ¶12).

2. Issue - owner of the loan since 2012

This is a mortgage foreclosure action that was initiated on December 22, 2017. The loan in question was entered into on March 28, 2012 between Defendant's mother, Ruth Witherspoon, and NVR Mortgage Finance, Inc. The loan was immediately transferred to Wells Fargo, who has been the owner and servicer of the loan ever since. (See Promissory Note dated March 28, 2012 endorsed to Wells Fargo and attached hereto as Exhibit A.) (R. Reply in Supp of S. J., p. 2) No affidavit was attached to Wells Fargo's Reply in Support of its Motion for Summary Judgment.

f. SUMMARY JUDGMENT ORDER

The Circuit Court's ruling in reference to wells Fargo not being a debt collector. In the present case, the only evidence before this Court is that Wells Fargo was at all times collecting a debt in its own name. Further, Wells Fargo was at the very least the loan servicer prior to the loan being in default (R. S. J. order, p. 7)

Circuit Court granted summary judgment on August 7, 2019 in favor of Wells Fargo and states, "...based on either Wells fargo's possession of the original note or its

status a loan servicer, there is no genuine issue of material fact as to Wells Fargo's standing to initiate this foreclosure action." (R. S.J. Order, p. 9 ¶ 2) NO AFFIDAVIT SUPPORTING WELLS FARGO'S STANDING WAS BEFORE THE COURT.

g. WELLS FARGO'S RESPONDENT'S BRIEF (2021)

In its Respondent's Brief (2021), Wells Fargo reiterated its standing argument, possession of the original note, endorsed in blank and it is the loan servicer. And when addressing under appellants rule 15 motion to amend, Wells Fargo stated that Appellant's holder in due course argument was an iteration of lack of standing argument in the Sixth A. A. (Resp. Brief (2021), p. 13)

g. COURT OF APPEALS OPINION

The Court of Appeals Opinion submitted July 27, 2022, filed August 17, 2022 states, "We hold the Circuit Court heard an correctly determined that Wells Fargo had standing because Wells Fargo is in possession of the original note, which is supported by the record." "See S.C. Code Ann. §36-3-301 (Supp. 2021) ("Person entitled to enforce an instrument means (i) the holder of the instrument...") (R. COA Op., p 2, ¶ 4) Did not address real party in interest at commencement, or what evidence supports, blank endo

h. REMITTITUR

The Remittitur Issued March 15, 2024 and states only, "The above referenced matter is hereby remitted to the lower court of tribunal. A copy of the judgment of this Court is enclosed." (R. Remittitur, p. __) The Remittitur contains no restrictions, limitations or additional instructions.

i. FINAL HEARING TRANSCRIPT

j Additionally, in the same Court of Appeals Opinion, reflects that joint tenancy and foreclosure intervention were not properly before the court. Consequently, the merits of those issues were not reached. COA Op., p. 5, ¶ 3, ¶ 4)

k. Finally, the Notice of Default was not raised at the final hearing; accordingly it was never raised in the prior appeal.

l. Wells Fargo's mention of preservation without explaining to the court what issues are or are

not preserved fails to establish waiver or any support for the Master in Equity's Order dated December 12, 2024 and therefore fails and should be rejected. note dont for get to includes exhibits in designation

Note: for time element and servicer

Wells Fargo argued that ti was a the very least the loan servicer before default, relying on Appellant's application for ssistance with Wells Fargo. The application, however shows that Appellant sought assistnace from Wells Fargo; it did not, by itself, establish Wells Fargo's status a the loan servicer.

note- FORCLOUSRE INTERVENTION IS OFFERED AFTER THE COMPLAINT AND WITHIN30 DAYS NOT BEFORE THE FORECLOSURE.

4. LAW OF THE CASE

a. Wells Fargo characterizes this appeal as an attempt to relitigate counter-claims and previously dismissed defenses, which were resolved by the circuit court's Summary Judgment order and South Carolina Court of Appeals prior appellate decision. However, Appellant's operative brief presents four legal errors arising from the Master-In-Equity's final order and judgment entered on December 12, 2024.

b. In response to Wells Fargo's characterization of the issues, Appellant clarifies that her appeal asks whether the circuit court erred as a matter of law in concluding that Wells Fargo was entitled to foreclose. To further demonstrate that the issues presented in this appeal have not been previously decided, Appellant more precisely restates her issue statements here, as follows:

1. Appellant's Issue I

Whether the Circuit Court erred in treating holder status, as established at the final hearing as

sufficient to establish that Wells Fargo had the substantive right to enforce the note when the complaint was filed.

A. Basis for Issue I question

2. Wells Fargo questions its witness. Is Wells Fargo currently in possession of the original note and the loan servicer. Answer, yes. (Tr., p. 10, line__)

A copy of the Note, Mortgage and Assignment of the Mortgage were admitted into evidence at the final hearing and the Circuit Court determined that Wells Fargo was the holder of the note and assignee of the mortgage and has standing to proceed (Final order, p. 5, line - 1; p.5, item 17; p. 6, ¶ 14).

2. Appellant's Issue 2

Whether the circuit court erred as a matter of law in concluding that any notice required under the Note and Mortgage was provided before commencement of the foreclosure action, without determining whether the contractual conditions for acceleration had been satisfied.

3. Appellant's Issue 3

Whether the circuit court erred as a matter of law in concluding that Wells Fargo was entitled to foreclosure, by considering only the granting clause of the Special Warranty Deed, rather than construing the deed as a whole and harmonizing its granting and habendum clauses to give effect to all of its provisions.

4. Appellant's Issue 4

Whether the Circuit Court erred as a matter of law in finding that Wells Fargo complied with Foreclosure Intervention requirements under the S.C. Supreme Court Administrative Order 2011-05-02-01, and in finding that the Appellant's noncompliance claim was abandoned, without determining whether Wells Fargo had complied with the requirements of the Order. (statutory interpretation)

c. Wells Fargo cannot establish a procedural bar merely by characterizing Appellant's arguments as attempts to relitigate matters previously decided. Appellant does not ask this Court to reopen dismissed counterclaims or defenses, nor does she challenge the determination of matters that were actually decided. Rather, Appellant challenges the legal basis upon which

the circuit court entered its final Order of Foreclose entered on December 12, 2024 and t and contends that the specific questions presented in this appeal were not previously decided.

d. The law-of-the-case doctrine does not bar consideration of the temporal standing issue, which was fairly before the court in Appellant's Sixth Amended Answer and her Memorandum in Opposition/Personal Knowledge Affidavit because that precise question was never decided by either the circuit court or this Court. Under well-settled South Carolina law, the doctrine applies only to issues that were actually decided in a prior appeal; it does not extend to questions that were left unresolved. See *Flexon v. PHC-Jasper, Inc*, 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015) (law of the case applies only to issues “actually decided”); *Woodson v. DLI Props., LLC**, 406 S.C. 391, 404, 751 S.E.2d 601, 608 (Ct. App. 2013) (same).

e. In the prior appeal, this Court affirmed the circuit court’s determination that Wells Fargo had standing based on its possession of the original promissory note. Unpublished Opinion No. 2022-UP-326. Critically, however, neither the circuit court nor this Court ever determined 'when' Wells Fargo obtained possession of the note or whether it possessed the note on the date the complaint was filed—December 22, 2017. The temporal element of standing was therefore never adjudicated. Because the issue was not actually decided, the law-of-the-case doctrine has no application.

Moreover, the Master-in-Equity’s final Order of Judgment of Foreclosure and Sale does not supply the missing determination. The Master’s order is silent on the earlier summary-judgment rulings and contains no independent finding that Wells Fargo possessed the original note (or otherwise held the right to enforce) at the commencement of the action. As a result, the temporal standing question remains open for review in this appeal from the final judgment.

f. The law of the case doctrine does ot preclude consideration of an issue when the evidence presented is in the later proceeding is substantially different from the evidence presented when the prior ruling was made. The following is a list of the documents at the summary judgment

stage and the final hearing:

1. SUMMARY JUDGMENT
STAGE

FINAL HEARING

Copy of promissory Note, endorsed in blank
(not notarized)
Note (original)
Attorney argument that Wells Fargo is in
possession of the original note
No affidavits (no authentication of Complaint)
compl.)

Promissory Note endorsed in blank
Witness testimony to
Mortgage
Assignment of Mortgage
(No testimony of status at filing of

g. At summary judgment, the evidentiary record relied upon by Wells Fargo consisted of a copy of the promissory note and

's substantive right to enforce the note when the complaint was filed. as a matter of law misapplied the governing legal standard when it ruled on standing, without determining whether Wells Fargo held the substantive right to enforce the note at the time the complaint was filed.

The circuit court determined the broader standing issue, possession of the original note and loan servicer status and the S. C. Court of Appeals determined the broader standing issue, based on possession, holder and entitlement to enforce. (Cir. Ct. S. J. Order, p. __); (S. C. Ct. Opn., p. __). Neither Court addressed the temporal issue, now being raised for the first time on appeal. (Cir. Ct. S. J. Order, p. __); (S. C. Ct. Opn., p. __)

2. Whether the Circuit Court misapplied the governing legal standard contained in the note and mortgage, when the Circuit Court held that any notice required by the note and mortgage was given prior to the commencement of the action. Respondent raised this issue for the first time in the proceeding and at the final hearing, which could not have been raised in the prior appeal. (Tr., p. __)

(i) This issue is currently on appeal and arises from the Master in Equity's Final Order and Judgement entered on December 12, 2024. (Final order, p. __). The S. C. Court of Appeals previously stated that Appellant's question regarding joint tenancy was not properly before the court. (Ct. ap., p. __) .

4. Whether the Circuit Court misapplied the governing legal standard when determining whether Wells Fargo complied with Foreclosure Intervention and whether Appellant abandoned her claim of Wells Fargo's non compliance. The S. C. Court of Appeals stated that Foreclosure Intervention was not properly before the court. (Ct. ap, p. __). There and did not address the

merits.

5. Collateral Attack, Finality, and Preclusion

Wells Fargo characterizes this appeal as an impermissible collateral attack on final rulings. It is not. This is a direct appeal from the judgment, and Appellant asks this Court to review the ruling presented for appellate review—not to collaterally attack a separate, final judgment. Wells Fargo invokes finality, but finality does not establish that every issue related to a final ruling was actually and necessarily determined.

The doctrines of *res judicata* and collateral estoppel likewise do not preclude review of the issue presented. Under South Carolina law, issue preclusion applies only to an issue that was actually litigated and necessarily determined in the prior proceeding. *See, e.g., Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). Here, the prior rulings determined Wells Fargo's substantive right to enforce the note, but did not determine whether that right existed when the complaint was filed on December 22, 2017, as required by Rule 17(a). Appellant therefore is not seeking to relitigate an issue that was actually and necessarily determined.

Accordingly, Wells Fargo's characterization of this appeal as a collateral attack, and its reliance on finality and preclusion doctrines, do not apply to the issue presented, nor do they support the Master-in-Equity's final judgment. Wells Fargo's argument should therefore be rejected.

II. RESPONDENT'S STATEMENT OF ISSUE NUMBER II

Whether Hodges's standing argument fails because standing was already litigated

and, in any event, Wells Fargo proved standing at the final foreclosure hearing through the original

note endorsed in blank, servicing testimony, and recorded assignment.

A. APPELLANT'S REPLY TO REPENDENT'S ISSUE II

Wells Fargo's Procedural Standing Argument Does Not Resolve the Issue Presented

Wells Fargo contends that Appellant's standing argument fails procedurally because the prior summary-judgment ruling was affirmed and the remittitur issued. That argument does not address the issue presented in this appeal. Appellant does not seek to relitigate the prior ruling that Wells Fargo had a substantive right to enforce the note. That issue was decided. The issue presented is whether that ruling fully resolved the separate Rule 17(a) question of whether Wells Fargo was the real party in interest when this action was commenced.

Wells Fargo pleaded its entitlement to foreclose in the Complaint. Under Rule 71, proof shall be made of the facts and circumstances alleged in the pleadings. Rule 17(a) separately requires that an action be prosecuted in the name of the real party in interest. Thus, the issue presented is whether Wells Fargo established that it was the real party in interest when this action was commenced, rather than merely whether Wells Fargo ultimately produced evidence supporting enforcement of the note at the final hearing.

Wells Fargo's reliance on *Bank of America v. Draper* likewise does not resolve that question. *Draper* expressly recognized Rule 17(a)'s real-party-in-interest requirement and explained that standing is a fundamental requirement for instituting an action. The court's analysis also considered what the plaintiff asserted when it filed the foreclosure action and the evidence supporting that assertion. *Bank of America, N.A. v. Draper*, 405 S.C. 214, 222–23, 746 S.E.2d 478, 482–83 (Ct. App. 2013). Thus, *Draper* does not eliminate the temporal component of the Rule 17(a) inquiry merely because a plaintiff later produces evidence establishing a right to enforce.

Although evidence introduced later may establish a fact existing earlier, the evidence must establish that Wells Fargo possessed the asserted right to enforce the note when this action was

commenced. The issue is therefore not when Wells Fargo introduced the evidence, but what the evidence establishes about the timing of its right.

Wells Fargo's assertion that it produced the original note, the endorsements, the recorded mortgage assignment, and testimony at the final hearing therefore does not resolve the issue presented. Appellant does not contend that an endorsement was required to bear a date, nor does Appellant challenge the admissibility of the note on that basis. The point is narrower: without a date on the endorsements or other evidence establishing when Wells Fargo acquired the asserted right to enforce the note, the evidence identified by Wells Fargo does not itself establish when that right existed in relation to the commencement of this action. Nor does the recorded mortgage assignment resolve the issue. An assignment of the mortgage, standing alone, does not establish a transfer of the note. *Draper* recognized that an assignment of a mortgage alone does not carry with it an assignment of the note. *Draper*, 405 S.C. at 218, 746 S.E.2d at 480. Thus, the recorded mortgage assignment does not, by itself, establish when Wells Fargo acquired the right to enforce the note.

Nor can Appellant's statement to the Master that the case did not turn on possession be treated as a concession of the issue presented here. Appellant reiterates that possession of the note is not the issue presented in this appeal. The prior proceedings determined that Wells Fargo possessed the note and had a right to enforce it. That determination does not, however, establish when Wells Fargo acquired that right or whether it possessed that right when this action was commenced. Appellant's statement therefore did not concede that Wells Fargo had established its right to enforce the note at the commencement of the action. The issue presented concerns the temporal component of Rule 17(a), not whether Wells Fargo ultimately possessed the original note.

Accordingly, Wells Fargo's argument that it produced the original note, endorsements, mortgage assignment, and testimony at the final hearing does not resolve the temporal Rule 17(a) issue presented in this appeal. Because the prior rulings determined Wells Fargo's possession and substantive right to enforce the note but did not determine whether that right existed when this action was commenced, Wells Fargo's procedural argument does not cure the legal error presented on appeal or provide a basis for affirming the judgment. The Rule 17(a) issue therefore remains subject to appellate review, and the judgment should be reversed to the extent it rests on an unresolved determination of Wells Fargo's status as the real party in interest at commencement.

III. RESPONDENT'S STATEMENT OF ISSUE NUMBER III

Whether the Master correctly entered foreclosure judgment where Wells Fargo proved the debt, default, standing, notice, and amount due through evidence admitted at the final hearing.

A. APPELLANT'S REPLY TO RESPONDENT'S ISSUE NUMBER III

Wells Fargo's Remaining Foreclosure-Element Argument Does Not Limit the Issues

Presented

1. Wells Fargo's assertion that the foreclosing party must prove the debt and default, followed by a shift in the burden to the opposing party to establish a defense, does not limit the issues presented in this appeal to payment, lack of consideration, or accord and satisfaction. Those are examples of defenses that may arise after the foreclosing party establishes the matters for which it bears the burden; they do not define the full scope of the issues presented here.

2. Wells Fargo also states that Appellant introduced no evidence that the note was paid, released, satisfied, or otherwise unenforceable. Appellant did introduce the Special Warranty Deed as evidence concerning the status of the subject property and the claimed lien. The joint-tenancy issue is addressed fully in response to Wells Fargo's Issue 5.

3. Wells Fargo raises standing again in this portion of its argument. However, the standing issue has been fully addressed under Issue 2.

The issues concerning the Notice of Default, including the evidence concerning the asserted default, are addressed in response to Wells Fargo's Issue 4. The foreclosure-intervention issue is likewise addressed in response to Wells Fargo's Issue 4.

4. Wells Fargo's evidence concerning the debt and the amount claimed does not resolve the separate issues raised in this appeal. Those issues are addressed in the specific sections identified above, where Appellant responds to Wells Fargo's corresponding arguments. Accordingly, Wells Fargo's Issue 3 does not establish that the foreclosure judgment should be affirmed on the grounds asserted in this portion of its brief.

IV. RESPONDENTS STATEMENT OF ISSUE NUMBER IV

Whether Hodges established any valid defense to foreclosure.

A. APPELLANT'S REPLY TO RESPONDENT'S ISSUE IV

The Evidence Does Not Support the Master's Determination That the Contractual Notice

Requirement Was Satisfied

1. The Master determined in the Judgment of Foreclosure and Sale that “[a]ny notice required under the Note and Mortgage was provided prior to the commencement of the action.” The evidence before the Master included Wells Fargo’s February 16, 2017 notice, which was admitted without objection. But the admission of that notice does not establish that it satisfied the contractual notice requirement for the May 1, 2017 default upon which the foreclosure proceeded. As shown above, Wells Fargo’s own payment history reflects that the delinquency identified in the February notice was cured on March 22, 2017.

2. Thus, the evidence before the Master does not establish the necessary connection between the February 16 notice and the May 1 default. Accordingly, the evidence does not support the Master’s determination that the contractual notice requirement was satisfied, and that determination cannot support the foreclosure judgment.

B. Hud Fact-To-Face Defense

In reply to Wells Fargo's argument concerning preservatuib if a searate HUD face-to-fac defense does not alter the contractual notice issue presented here. he issues concering the February 16, 2017 notice an whether it satisied the contratual notice requirement are addressed above in paragraph A.

C. Wells Fargo’s Abandonment Argument Does Not Establish Compliance or an Express Waiver

1. Wells Fargo argues that Appellant expressly abandoned the foreclosure-intervention issue at the final hearing and that the abandonment ends the inquiry. That argument conflates two separate matters. The Master found both that “based on the evidence admitted at the hearing, Wells Fargo complied with foreclosure intervention” and that “Appellant abandoned the issue.” Appellant’s statements concerning whether she was continuing to pursue the issue cannot serve

as proof that Wells Fargo complied with the Administrative Order.

2. At the hearing, Appellant stated that she was “not concerned about that anymore” and clarified that she had been concerned about the issue previously but was not pursuing it at that point in the hearing. Those statements establish only that Appellant was no longer pursuing the foreclosure-intervention issue at that point in the proceeding. They do not constitute an admission that Wells Fargo complied with Administrative Order 2011-05-02-01, nor do they establish the facts necessary to prove Wells Fargo’s compliance. **Abandonment of an issue by Appellant is not evidence of compliance by Wells Fargo.**

3. The distinction is particularly important because the Master expressly based the compliance finding on “the evidence admitted at the hearing.” The statements attributed to Appellant do not establish compliance with the requirements of the Administrative Order. Thus, even if the Court were to agree that Appellant discontinued pursuing the issue at the final hearing, that conclusion would not supply the evidentiary basis for the Master’s separate finding that Wells Fargo complied with the Administrative Order.

4. Nor did Appellant expressly waive the issue. Wells Fargo relies on *Equivest Financial, LLC v. Ravenel*, 422 S.C. 499, 505, 812 S.E.2d 438, 441 (Ct. App. 2018), for the proposition that an argument expressly waived at trial cannot be raised on appeal. *Equivest*, however, involved an express waiver. Here, Appellant did not state that Wells Fargo had complied with the Administrative Order or that she was conceding compliance. She stated only that she was no longer concerned with pursuing the issue. Those statements are not an express waiver of the contention that Wells Fargo failed to comply with the Administrative Order.

5. Moreover, whether Appellant’s statements and conduct constituted abandonment is a question of law. See *Carolina Land Co. v. Bland*, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975)

(whether conduct constitutes abandonment depends upon whether there is a clear and unmistakable affirmative act indicating an intent to relinquish the right). Accordingly, the legal effect of Appellant's statements is subject to this Court's review and cannot be determined solely by the Master's characterization of those statements as abandonment.

6. Wells Fargo therefore cannot convert Appellant's decision to stop pursuing the foreclosure-intervention issue into either evidence of Wells Fargo's compliance or an express waiver of Appellant's contention that Wells Fargo failed to comply. The Master's abandonment finding does not establish the separate compliance finding, and the absence of an express waiver means *Equivest* does not dispose of the issue. The Master's findings concerning foreclosure intervention therefore cannot be affirmed merely on the basis that Appellant stated she was no longer pursuing that issue.

V. RESPONDENT'S STATEMENT OF ISSUE NUMBER V

Whether the Master correctly rejected Hodges's joint-tenancy/extinguishment theory because the deed conveyed title to Ruth Witherspoon, no joint tenancy with right of survivorship was created, and Ruth Witherspoon's death did not extinguish Wells Fargo's recorded purchase-money mortgage.

A. APPELLANT'S REPLY TO RESPONDENT'S ISSUE NUMBER V

The Recorded Mortgage Does Not Resolve Whether the Deed Created a Joint Tenancy with the right of survivorship.

1. Wells Fargo mischaracterizes Appellant's argument. Appellant is not arguing that the words "heirs and assigns" make her a co-grantee, nor that Wells Fargo's mortgage was extinguished merely because Appellant did not sign it. The issue is whether the deed, **read as a whole and pursuant to S.C. Code §§ 27-7-10 and 27-7-40**, conveyed the property to Ruth Witherspoon and Hodges as joint tenants with right of survivorship.

2. Appellant relies on *Glasgow v. Glasgow*, 221 S.C. 270, 70 S.E.2d 432 (1952), for the principle that the provisions of a deed should be harmonized and construed as a whole. When the deed is construed as a whole, including its granting clause and habendum clause, the express language concerning joint tenancy must be given effect. A single grant harmonized with a habendum clause that expressly provides for joint tenancy, such as in this case are not repugnant when the deed is read as a whole.

This approach is consistent with more recent authority recognizing clear survivorship intent in Deeds. See *Smith v. Cutler*, 366 S.C. 546, 623 S.E.2d 644 (2005), and *Smith v. Rucker*, 358 S.C. 318, 594 S.E.2d 876 (Ct. App. 2004), likewise does not resolve the issue merely by characterizing the mortgage as a recorded purchase-money mortgage. The question presented is the interest created by the deed and the effect of Ruth Witherspoon's death upon that interest. The deed must therefore be examined according to its actual language, including the granting and habendum clauses, rather than by treating the recorded mortgage as dispositive of the ownership interest conveyed.

Accordingly, Wells Fargo's characterization of Appellant's theory as an attempt to "erase" its recorded mortgage does not answer the deed-construction issue. The relevant question is whether the deed created a joint tenancy with right of survivorship and, if so, what effect Ruth Witherspoon's death had upon the interest conveyed to the surviving joint tenant. Finally Wells Fargo's characterization does not answer the question presented or establish that the circuit court's ruling was correctly determined the effect of the special warrant deed.

CONCLUSION

For the reason stated above the Appellant requests that the Final Order of Foreclosure and Sale entered on December 12, 2024 be reversed and a remand for any issues remaining.

Respectfully submitted

/s/ Michelle Hodges

Michelle Hodges
michellehodges938@gmail.com
6 Young Harris Dr.
Simpsonville, Sc 29681
864-692-379