

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

SC Court of Appeals

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2013-001412

HSBC Bank USA, National Association, as  
Trustee for MLCC 2007-2 .....Respondent,

vs.

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

Of whom

S. Russell Fielden and Deborah M. Fielden, are..... Appellants.

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**INITIAL BRIEF OF THE RESPONDENT**

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February 7, 2014

**TABLE OF CONTENTS**

Table of Authorities.....3

Statement of Issues on Appeal.....5

Statement of the Case .....6

Statement of the Facts.....7

Standard of Review .....12

Argument.....13

**I. Several issues raised on appeal were not preserved for appellate review .....13**

**II. Appellant abandoned several of the issues raised in their appeal by failing to cite any authority in support of them .....14**

**III. Respondent was the holder of the original Note and, therefore, had standing to enforce the Note.....15**

**IV. Assignments of mortgage are not transfer documents, convey no right or interest in the note or loan, and are a nullity as to the issue of standing .....18**

**V. Appellants’ arguments regarding the “Notice of Intention to Foreclose” are moot .....19**

**VI. Even if the arguments regarding the “Notice of Intention to Foreclose” are not moot, the notice was sufficient pursuant to the terms of the Mortgage. ....21**

Conclusion.....23

## TABLE OF AUTHORITIES

### CASES

<i>BAC Home Loan Servicing, L.P. v. Kinder</i> , 398 S.C. 619, 731 S.E.2d 547 (2012) .....	18
<i>Ballou v. Young</i> , 42 S.C. 170, 20 S.E. 84 (1894) .....	18
<i>Bank of Am., N.A. v. Draper</i> , 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) .....	17
<i>Bank of America, N.A. v. Dauda</i> , 2013 WL 786767 (Fla.Cir.Ct) (Trial Order).....	22
<i>Bennett v. Investors Title Ins. Co.</i> , 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006).....	14
<i>Hahn v. Smith</i> , 157 S.C. 157, 154 S.E. 112 (1930).....	18
<i>Hayne Fed. Credit Union v. Bailey</i> , 327 S.C. 242, 489 S.E.2d 472 (1997).....	12
<i>In re Woodberry</i> , 383 B.R. 373 (Bankr. D.S.C. 2008).....	16, 18, 19
<i>I'On v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	12, 13
<i>Lowcountry Open Land Trust v. Charleston S. Univ.</i> , 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008).....	12
<i>Mathis v. South Carolina State Highway Dep't</i> , 260 S.C. 344, 195 S.E.2d 713 (1973).....	20
<i>Midfirst Bank, SSB v. C.W. Haynes &amp; Co., Inc.</i> , 893 F. Supp. 1304 (D.S.C. 1994).....	18
<i>Mortgage Elec. Sys., Inc. v. White</i> , 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009).....	12
<i>Pinckney v. Warren</i> , 344 S.C. 382, 544 S.E.2d 620 (2001).....	13

<i>Pye v. Estate of Fox</i> , 369 S.C. 555, 633 S.E.2d 505 (2006).....	13
---	----

<i>South Carolina Nat'l Bank v. Halter</i> , 293 S.C. 121, 359 S.E.2d 74 (Ct.App.1987) .....	19
---	----

STATUTES AND RULES

Rule 59(e), SCRCP .....	13
S.C. App. Ct. R. 268.....	22
S.C. Code Ann. § 30-7-30.....	18
S.C. Code Ann. § 30-7-40.....	18
S.C. Code Ann. § 36-1-201(20).....	16
S.C. Code Ann. § 36-3-101 .....	15
S.C. Code Ann. § 36-3-109(c).....	16
S.C. Code Ann. § 36-3-203.....	16, 17
S.C. Code Ann. § 36-3-205(b).....	16
S.C. Code Ann. § 36-3-301 .....	15, 17
S.C. Code Ann. § 36-3-309 .....	15
S.C. Code Ann. § 36-3-418(d).....	15

**STATEMENT OF ISSUES ON APPEAL**

**I. DID APPELLANTS PRESERVE ALL OF THE ISSUES FOR APPELLATE REVIEW?**

**II. DID APPELLANTS ABANDON SEVERAL OF THE ISSUES RAISED IN THEIR APPEAL BY FAILING TO CITE ANY AUTHORITY IN SUPPORT OF THEM?**

**III. DID THE TRIAL COURT ERR IN RULING THAT THE RESPONDENT HAD STANDING TO BRING THE ACTION?**

**IV. DID THE TRIAL COURT ERR IN RULING THAT THE RESPONDENT PROPERLY ACCELERATED THE DEBT PURSUANT TO THE TERMS OF THE MORTGAGE?**

## STATEMENT OF THE CASE

On June 14, 2010, Respondent HSBC Bank USA, National Association, as Trustee for MLCC 2007-2 (“Respondent”) filed this foreclosure action against S. Russell Fielden and Deborah M. Fielden (“Appellants”) concerning the real property at 241 De La Gaye Point, Beaufort, SC 29902 (“Subject Property”). (Complaint.) On August 13, 2010, the Clerk of Court referred the action to the Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County (“Master”). (Order of Reference.) On July 14, 2010 the Appellants filed a Motion to Dismiss. (July 14, 2010 Motion to Dismiss.) On November 29, 2010 the Appellants filed a Motion to Dismiss or for Summary Judgment. (Motion for Summary Judgment.) On November 29, 2010 the Appellants filed an Answer and Counterclaim asserting affirmative defenses of: lack of standing, real party in interest, setoff, mortgage not a valid part of securitized mortgage trust, and invalid assignment of note. (Answer and Counterclaim.) Appellants also asserted an equitable counterclaim seeking a declaratory judgment that the mortgage was invalid. On December 22, 2010, Respondent filed a Reply to Appellants’ Answer and Counterclaim. (Reply.) On February 14, 2013 Appellants filed a Motion to Dismiss. (February 14, 2013 Motion to Dismiss.) On February 18, 2013 Respondent filed a Memorandum of Law regarding the standing of the Plaintiff to bring the foreclosure action. (Memorandum of Law.) The non-jury trial was held on February 18, 2013. On March 18, 2013 the Master in Equity issued a Judgment of Foreclosure and Sale. (Foreclosure Judgment.) On March 20, 2013 Appellants filed a Motion to Reconsider or in the Alternative Alter Judgment on Behalf of Plaintiff. (Motion for Reconsideration.) On May 6, 2013, the Subject Property was sold at the scheduled judicial sale. Respondent

was the successful bidder. (Report on Sale.) On May 15, 2013 the Master in Equity issued an Order denying Appellants Motion for Reconsideration. (59(e) Order.) This appeal from the Foreclosure Judgment and 59(e) Order followed.

### **STATEMENT OF THE FACTS**

This appeal involves the foreclosure of a real estate mortgage covering property lying in Beaufort County, South Carolina, and the subsequent judicial sale of the Subject Property.

On May 17, 2006, Appellants executed and gave a promissory (“Note”) to Coastalstates Bank, A C Corporation in the amount of \$468,000.00. (Pl.’s Exhibit 1 to Trial Tr.) In order to secure the payment of the Note, the Appellants executed and delivered a mortgage to Mortgage Electronic Registration Systems, Inc. acting solely as nominee for Coastalstates Bank. The Mortgage was signed, witnessed and probated May 17, 2006, and was recorded on May 19, 2006, in Mortgage Book 2376 at Page 1741. The Mortgage covered the Subject Property, which is fully described as:

ALL that certain piece, parcel or lot of land with improvements located in the City of Beaufort, Beaufort County, South Carolina, being shown and depicted as Lot 112. Plowmans Point, on that plat entitled, “Subdivision Plat Main Island Phase III Islands Of Beaufort,” prepared for Beaufort Properties, L.L.C., prepared by Gasque & Associates, Inc., by David E. Gasque. R.L.S dated January 14, 2002 and recorded in Plat Book 87 at Page 128 with the Register of Deeds Office for Beaufort County.

Said property is subject to all Rights, Easements., Restrictions, Affirmative Obligations, Conditions, described in the Declaration of Master Covenants, Conditions And Restrictions for the Islands Of Beaufort Subdivision recorded in Book 1060 at Page 954, and Supplemental Declaration of Covenants And Restrictions Running with Phase III Of The Islands of Beaufort Subdivision recorded in Book 1255 at Page 859 with the Register of Deeds Office for Beaufort County.

This being the identical property conveyed to S. Russell Fielden and Deborah M. Fielden by deed of Michael L. Mapes and Jackie G. Clarkson dated May 11, 2006 and recorded May 19, 2006 in Deed Book 2376 at Page 1738.

Property Address: 241 De La Gaye Point  
Beaufort, SC 29902

TMS# R120-032-000-0372-0000

The Mortgage constituted a purchase money first lien on the mortgaged premises. (Pl.'s Exhibit 2 to Trial Tr.) The Mortgage was later assigned to Respondent by an Assignment of Mortgage dated August 13, 2010, and recorded on August 23, 2010, in Book 2984 at Page 857 ("Assignment of Mortgage"). (Pl.'s Exhibit 3 to Trial Tr.)

On or about January 1, 2010, Appellants defaulted on the repayment of the Note, and Respondent filed this action for foreclosure of the Mortgage on the Subject Property on June 14, 2010. (Complaint.) On February 22, 2010, Appellants were sent a Notice of Intention to Foreclose letter stating the loan was in default and foreclosure proceedings would occur if the loan was not brought current. ("Notice of Intention to Foreclose"). (Pl.'s Exhibit 5 to Trial Tr.)

The final hearing in the matter was held before the Master in Equity on February 18, 2013. (Trial Tr.) Prior to the hearing, Respondent's counsel filed a Memorandum of Law as to the issue of standing. (Pl.'s 2/18/13 Memo. of Law.) During the hearing, Respondent proffered the testimony of William Turner, a representative of PHH Mortgage Corporation ("PHH"), the loan servicer for the Respondent. Mr. Turner testified that, as the servicer of the mortgage loan, PHH was responsible for maintaining the payment history of the loan (Trial Tr. 10:15-24) and was also responsible for providing notice of the default. (Trial Tr. 16:8-11.) Further, Mr. Turner testified that PHH is the custodian of the records of the Respondent and that PHH was in possession of

the original Note and delivered it to Respondent's attorneys for use in the foreclosure action. (Trial Tr. 30:7-14.)

During the hearing, Respondent's counsel presented the original Note with allonges. (Trial Tr. 8:15 to 9:7.) Mr. Turner testified that the Note was endorsed in blank. (Trial Tr. 8:12-14.) Further, Mr. Turner identified the Assignment of Mortgage and confirmed that the Mortgage was assigned to Respondent. (Trial Tr. 10:1-10.) Copies of the Note, Mortgage, Assignment of Mortgage, and Notice of Intention to Foreclose were all entered into evidence without objection from Appellants. (Trial Tr. 13:23 to 14:3.) Finally, Mr. Turner testified as to the debt owed, according to his review of the records and payment history. (Trial Tr. 12:3 to 13:24.) Counsel for the Appellants cross-examined Mr. Turner regarding the Pooling and Servicing Agreement ("PSA") relating to the subject loan. Mr. Turner was not personally familiar with the terms of the PSA or the requirements of the PSA as it relates to the specific requirements and terms for each of the parties to the PSA, and was, instead, only familiar with the requirements of the servicer. Counsel for the Respondent objected to the line of questioning regarding the PSA as irrelevant to the matter at hand in light of the fact that the borrowers were not parties to the PSA, and therefore had no interest or standing to challenge compliance with the PSA by the Respondent, servicer, or depositor. (Trial Tr. 17:8 to 27:15.) Respondent's counsel did not call any further witnesses. (Trial Tr. 42:20-24.)

Counsel for the Appellants then called Appellant S. Russell Fielden ("Mr. Fielden") as a witness. (Trial Tr. 43:2-3.) Mr. Fielden testified as to his requests for information relating to the ownership of the loan and his attempts at obtaining a loan modification. (Trial Tr. 43:20 to 48:14.) Mr. Fielden further testified regarding his own

personal research relating to the ownership of his loan. (Trial Tr. 48:21 to 51:22.) On cross-examination by Respondent's counsel, Mr. Fielden was asked about his contention regarding the difference in the language in the Notice of Intention to Foreclose letter and the Mortgage. During his cross-examination, Mr. Fielden did not point out any differences in the language of the letter. (Trial Tr. 53:5 to 54:18.) It was only through re-direct, during which counsel for the Appellant guided Mr. Fielden through the language of each of the documents, that Mr. Fielden was able to pick up on the subtle difference in the language of the two documents. (Trial Tr. 58:16 to 59:25.) Following the testimony, counsel for the Respondent and counsel for the Appellants made legal arguments regarding standing and Appellants' counsel made a motion for a directed verdict. (Trial Tr. 61:5 to 70:23.) The Master in Equity denied the motion for directed verdict and instead took the matter under advisement. (Trial Tr. 70:24 to 71:3.)

On March 18, 2013, a Judgment of Foreclosure and Sale was entered by the Master in Equity. In the Foreclosure Judgment, the Master made the following findings of fact:

- At the hearing on February 18, 2013, Defendant S. Russell Fielden and Deborah M. Fielden argued that Plaintiff is not the real party in interest entitled to enforce the note and mortgage due to its failure to follow the transfer requirements of the Pooling and Servicing Agreement under Article 9 of the New York Uniform Commercial Code. Specifically, including the endorsement requirements on the note and its failure to demonstrate the complete chain of transfers. The court finds that the Plaintiff is in possession of the original Note endorsed in blank and therefore has standing to bring this action. (Judg. of Foreclosure and Sale ¶ 10);
- Payment due on the Note was not made as provided for therein, and Plaintiff; as the holder or nominee for the holder thereof, has elected to require immediate payment of the entire amount due thereon and placed the Note and Mortgage in the hands of the attorney herein for remedy by foreclosure. (Judg. of Foreclosure and Sale ¶ 14.)

The judgment amount and attorney's fee award was also included. The Master then made the following conclusions of law:

- The Plaintiff has standing to bring this action. (Judg. of Foreclosure and Sale ¶ 20);
- There is due on the Note and first Mortgage set forth in the Complaint the sum of \$626,053.67, as set out in the Findings of Fact supra, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof. (Judg. of Foreclosure and Sale ¶ 22);
- On default of payment at or before the time of the sale of the property, the mortgaged property described hereinafter shall be sold by the below signed Master in Equity or Special Referee or other court-appointed or designated agent or auctioneer at public auction at the Beaufort County Courthouse, in the City of Beaufort, and State of South Carolina, on a sales day determined by the below signed Master in Equity or Special Referee... (Judg. of Foreclosure and Sale ¶ 27).

Additional conclusions of fact and law were made for the purposes of the foreclosure judgment and terms of the sale. The judicial sale was scheduled for May 6, 2013. (Notice of Sale.)

Appellants' Motion to Reconsider or in the Alternative Alter Judgment on Behalf of Plaintiff was filed on March 20, 2013. A hearing on Defendant's Motion to Reconsider was held on April 15, 2013. During the argument at the hearing, Appellants' counsel revived his arguments regarding Respondent's standing to prosecute the foreclosure. Specifically, Appellants' counsel argued that the allonges were not affixed to the original note and were altered by a stamp that did not exist on a copy of the allonge received by Mr. Fielden from PHH. Appellants' counsel argued that the allonges were invalid as a result. (Mot. Tr. 4:9 to 10:10.) Further, Appellants' counsel argued that the language of the Notice of Intention to Foreclose did not meet the requirements of Paragraph Twenty Two (22) of the Mortgage. (Mot. Tr. 11: 22 to 15:24.)

In response, counsel for the Respondent argued that Appellants failed to provide authority challenging the validity of the allonges in regards to the allonges being affixed to the Note and the issue regarding one allonge being altered due to a stamp. (Mot. Tr. 19:2 to 21:2.) Further, counsel for the Respondent argued that there could be no distinct difference in the language of Paragraph Twenty-Two of the Mortgage and the language of the Notice of Intention to Foreclose as “Mr. Fielden has done exactly what the mortgage entitles him to do, which is to bring up the defense to the foreclosure in the foreclosure action.” (Mot. Tr. 24:2-7.)

On May 6, 2013, the Subject Property was sold at the scheduled judicial sale. Respondent was the successful bidder. (Report on Sale.) Thereafter, an Order Denying Defendant’s Motion to Reconsider was entered on May 15, 2013.

### **STANDARD OF REVIEW**

The Court may affirm for any ground appearing in the record. Rule 220(c), SCAR; *see also Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 n. 2 (Ct. App. 2009)(citing *I’On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)).

“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). “In an appeal from an action in equity, tried by a judge alone, the Court may find facts in accordance with its own view of the preponderance of the evidence.” *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 406, 656 S.E.2d 775, 779 (Ct. App. 2008). “However, this broad scope of review does not require an appellate court to disregard the findings below or

ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses.” *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

“Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings.” *Id.* at 38788, 544 S.E.2d at 623.

## ARGUMENT

### **I. Several issues raised on appeal were not preserved for appellate review.**

Appellants failed to preserve several of the issues raised in their appeal for review by this Court. “It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.” *Pye v. Estate of Fox*, 369 S.C. 555, 564-65, 633 S.E.2d 505, 510 (2006). “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also* Rule 59(e), SCRPC. This preservation requirement “prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” *Id.*

The following issues raised in Appellant’s brief were not properly raised or ruled upon by the lower court and are, therefore, not preserved for appellate review:

- 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 the Foreclosure” (Appellants’ Br. P. 14);
- The Respondent did not receive the Appellant’s Mortgage Payments prior to filing their foreclosure (Appellants’ Br. P. 27)

- The Lower Court’s decision to deny the Appellant’s “Counter Claim” and “Motion to Dismiss” affected the marketability of the Appellants property (including subparts) (Appellants’ Br. P. 31-34).

**II. Appellant abandoned several of the issues raised in their appeal by failing to cite any authority in support of them.**

Appellants abandoned several of the issues raised in their appeal by failing to cite any authority in support of them. When an appellant fails to cite any supporting authority for his or her position and makes only conclusory arguments, the appellant abandons the issue on appeal. *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006).

Appellants cite no authorities in support of the following arguments and has thereby abandoned these issues:

- The “Notice of Foreclosure” the Appellants received was not originated or legally authorized by the Respondent (Appellants’ Br. p. 11);
- The original servicer represented Merrill Lynch Credit Corporation (sic) still owned the Appellants note and mortgage after the Respondent’s Trust was formed (Appellants’ Br. P. 13);
- 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 the Foreclosure” (Appellants’ Br. P. 14);
- No Respondent’s (sic) Trust Documents were offered as evidence by the Respondent to prove ownership of the Appellant’s Note and Mortgage (Appellants’ Br. P. 17);
- The Respondent failed to provide sufficient evidence they had the right to enforce the Appellant’s note and mortgage (Appellants’ Br. P. 20);
- 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 (Appellants’ Br. P. 21);
- There is evidence of numerous conflicting ownership claims of the Appellant’s note and mortgage (Appellants’ Br. P. 24);
- The Respondent’s late copy of an “Endorsement in Blank” by Merrill Lynch Corporation was invalid and conveyed nothing (Appellants’ Br. P. 25);
- The Respondent did not receive the Appellant’s Mortgage Payments prior to filing their foreclosure (Appellants’ Br. P. 27);

- 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 (Appellants’ Br. P. 28);
- PHH Mortgage provided the Respondent’s counsel with the original note and mortgage but had no servicer authorization from the Respondent (Appellants’ Br. P. 30);
- The Lower Court’s decision to deny the Appellant’s “Counter Claim” and “Motion to Dismiss” affected the marketability of the Appellants property (including subparts) (Appellants’ Br. P. 31-34).

As a result of the above-described waiver, the Master’s Foreclosure Judgment cannot be reversed on the basis of any of these issues.

**III. Respondent was the holder of the original Note and, therefore, had standing to enforce the Note.**

Respondent was the holder of the original Note and, therefore, had standing to enforce the Note. Negotiable instruments, which include promissory notes, are governed by Article 3 of the Uniform Commercial Code (“UCC”), codified in South Carolina as Title 36, Chapter 3 of the *South Carolina Code*. See *S.C. Code Ann.* § 36-3-101, *et seq.* Section 36-3-301 of UCC sets out specific provisions with regard to the enforcement of a negotiable instrument:

“Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.<sup>1</sup>

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<sup>1</sup> SC. Code Ann. § 36-3-309 deals with the enforcement of instruments which have been lost, destroyed, or stolen, and S.C. Code Ann. § 36-3-418(d) deals with circumstances where an instrument has been paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance. Neither of those sections applies here.

A “holder” is a person or entity “who is in possession of a document or title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank.” *S.C. Code Ann.* § 36-1-201(20). A note initially made payable “to order” can become a bearer instrument, if it is endorsed in blank. See *S.C. Code Ann.* 36-3-109(c) (providing that an instrument payable to an identified person may become payable to bearer if it is indorsed in blank); See also *S.C. Code Ann.* 36-3-205(b) (describing what qualifies as a blank endorsement). “When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone[.]” *S.C. Code Ann.* § 36-3-205(b). Further, possession of a bearer instrument [note] is *prima facie* evidence of ownership of the instrument. In re *Woodberry*, 383 B.R. 373, 377 (Bankr. D.S.C. 2008).

In this case, Respondent was in possession of the original Note with two allonges attached thereto. “An allonge is a ‘paper annexed to a negotiable instrument, for endorsements too numerous or lengthy to be contained in the original.’” *Id.* at 375. The first allonge to the subject Note contained an endorsement to Merrill Lynch Credit Corporation by the original lender CoastalStates Bank. The second allonge contained a blank endorsement by Merrill Lynch Credit Corporation. Under South Carolina law, an allonge to a note containing a blank endorsement stating “pay to the order of without recourse,” converts the promissory note to a bearer instrument. *Id.* at 375-77. Thus, the Note is payable to bearer and may be negotiated by transfer alone. *S.C. Code Ann.* § 36-3-203. Because the Respondent had possession of the original Note endorsed in blank, Respondent was the holder of the Note at the time of the foreclosure and had the power to enforce the Note under the *South Carolina Commercial Code*. § 36-3-301.

Even if the allonges to the Note were invalid or otherwise not enforceable, Respondent would still have had standing to enforce the Note. A negotiable note can be transferred without being negotiated or endorsed to the transferee, and that transfer would be effectuated by the physical delivery of the note. *S.C. Code Ann.* § 36-3-203. In that circumstance, the transferee would not be a holder. However, such a transferee would still have the right to enforce the note:

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...  
§ 36-3-203(b).

Appellants challenge the above-described legal standard on the basis that PHH Mortgage Corporation (“PHH”), the servicer for the Respondent, may have actually transmitted the original Note to the Respondent’s attorneys for use in the foreclosure proceeding and that PHH sent the Notice of Intention to Foreclose. As servicer of the subject mortgage loan, PHH was the party responsible for collecting payments, managing the payment history, and managing the foreclosure proceeding to ensure that the Respondent’s attorneys had all required and necessary information to properly prosecute the foreclosure. Also as Respondent’s servicer, PHH arranged to have the original Note transferred into the possession of the attorneys to ensure that the attorneys could, in fact, demonstrate that Respondent held the Note. The role of a mortgage servicer in a foreclosure proceeding has been previously addressed and accepted by courts in South Carolina. See generally *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013). The fact that Respondent’s mortgage servicer was involved in the transmission of the original Note to Respondent’s attorneys and the communication

regarding the intention to foreclose and/or accelerate does not affect Respondent's standing in this matter.

In sum, Respondent had possession of the original Note at the time of the foreclosure filing and, as a result, Respondent was entitled to enforce the Note and therefore had standing to prosecute the foreclosure.

**IV. Assignments of mortgage are not transfer documents, convey no right or interest in the note or loan, and are a nullity as to the issue of standing.**

Assignments of mortgage are not transfer documents, convey no right or interest in the note or loan, and are a nullity as to the issue of standing. The recording of an assignment of mortgage gives notice to third parties regarding the new holder of the debt, but it does not transfer the debt itself. See *S.C. Code Ann.* § 30-7-30 and § 30-7-40. Further, an assignment does not even have to be recorded, and failure to record an assignment of mortgage does not affect the rights of an assignee. *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 623-24, 731 S.E.2d 547, 549 (2012), reh'g denied (Sept. 6, 2012). South Carolina law “does not require both possession of the note and a written assignment of the mortgage to prove ownership...” *In re Woodberry*, 383 B.R. 373, 376 (Bankr. D.S.C. 2008) “South Carolina recognizes the ‘familiar and uncontroverted proposition’ that ‘the assignment of a note secured by a mortgage carries with it an assignment of the mortgage.’” *Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F. Supp. 1304, 1318 (D.S.C. 1994)(citing *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930); *Ballou v. Young*. 42 S.C. 170, 20 S.E. 84 (1894)). “The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the

transferee. . . .” *South Carolina Nat'l Bank v. Halter*, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct.App.1987) (citing *Hahn*, 157 S.C. 157, 154 S.E. 112). Therefore, enforcement of a note in South Carolina does not require the plaintiff to have a written assignment of the mortgage. *Woodberry*, 383 B.R. at 377.

Here, the Appellants claim that the Respondent lacked standing to bring a foreclosure action by attacking the validity of the written assignments of the mortgage. However, according to the great weight of the authority in South Carolina, assignments of mortgage are irrelevant to standing. See *Woodberry*, 383 B.R. at 377. Respondent possessed the original Note, with an allonge endorsed in blank, which secures the subject Mortgage. As the owner of the Note, Respondent was also the owner of the Mortgage. The assignment of the mortgage is not a document of transfer and is recorded only for the benefit of third party creditors or other interested parties. Respondent need not demonstrate a valid written assignment of the Mortgage to prove its ownership because it holds the Note. Therefore, the validity of an assignment of mortgage cannot affect Respondent’s standing to enforce the Note and Mortgage in the underlying action.

**V. Appellants’ arguments regarding the “Notice of Intention to Foreclose” are moot.**

Appellant’s arguments regarding the “Notice of Intention to Foreclose” are moot.

Our Courts have previously held that:

[a] case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.

*Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). In the case at bar, Appellants argue that Respondent did not properly provide Appellant notice of his rights regarding defense of the foreclosure action because the notice language did not exactly match the language of Paragraph Twenty-Two (22) of the Mortgage. The distinction that Appellants draw is that the Notice of Intention to Foreclose provides that Appellants have “a right to bring a court action to assert the nonexistence of default...” as opposed to the language of the Mortgage which requires notice that the borrower has “the right to assert *in the foreclosure proceeding* the non-existence of a default...” (emphasis added). Appellants’ argument is that the language in the Notice of Intention to Foreclose placed a greater burden on the Appellants and could mislead them into assuming the only way to assert a defense to the foreclosure was to bring their own legal action.

Appellants’ arguments are moot for two reasons: (1) Appellant admits to the default of the mortgage, and (2) Appellant did defend the foreclosure action based upon his alleged defenses to the foreclosure in the foreclosure proceeding and was not prevented or dissuaded from doing so pursuant to the language in the “Notice of Intention to Foreclose.” If this court was to reverse the Master in Equity’s Order and remand on this issue, there would be no effective relief as the Appellants have already had the full and fair opportunity to defend the foreclosure and plead their case. Further, the Appellants admitted their default, both in the underlying action and in their Brief (Appellant’s Br. P. 8-9), so they would now be estopped from asserting the non-existence of the default in the underlying action. Therefore, this court can have no practical legal effect upon the existing controversy in relation to this issue and the matter is now moot.

**VI. Even if the arguments regarding the “Notice of Intention to Foreclose” are not moot, the notice was sufficient pursuant to the terms of the Mortgage.**

Even if the arguments regarding the “Notice of Intention to Foreclose” are not moot, the notice was sufficient pursuant to the terms of the Mortgage. Paragraph Twenty-Two (22) of the subject Mortgage reads as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument...The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure...

According to this provision in the mortgage, the mortgagee or holder of the debt must include the following items in a notice of intent to foreclose or accelerate:

- (1) That a default event has occurred;
- (2) The actions required to cure the default;
- (3) The date by which the actions to cure must have occurred to prevent foreclosure / acceleration;
- (4) That failure to cure will result in acceleration, foreclosure, and judicial sale of the property;
- (5) That there is a right to reinstate after acceleration; and
- (6) That the borrower has a right to assert the non-existence of default or other defenses in the foreclosure proceeding.

The issue that Appellants raise with the Notice of Intention to Foreclose provided to him by Respondent is simply that, rather than stating that he had a right to assert the non-existence of default or other defenses *in the foreclosure proceeding*, the letter stated that he had “a right to *bring a court action* to assert the nonexistence of a default, or any other defense you may have to foreclosure and sale” (emphasis added). Appellant does not deny that every other one of the six (6) requirements was met.

Appellant cites an unpublished Florida order in the case of *Bank of America vs. Casey* in his brief in support of his argument that the “Notice of Intention to Foreclose” was insufficient or invalid. (Appellant’s Br. P. 8-9) Generally, unpublished orders have no precedential value in the State of South Carolina, except in related cases. S.C. App. Ct. R. 268. However, even if the *Casey* case was proper authority for this Court to consider, other Florida courts have disagreed with the *Casey* order and instead determined that the distinction raised by Appellant and the *Casey* defendants is one of “no legal consequence.” *Bank of America, N.A. v. Dauda*, 2013 WL 786767 (Fla.Cir.Ct) (Trial Order). The court in *Dauda* goes on to cite a Connecticut Superior Court case which holds that a deficiency in the notice of default and acceleration of mortgage does not preclude foreclosure where the mortgagor had actual notice. *N. Water, LLC v. N. Water St. Tarragon, LLC*, FSTCV075004758S, 2009 WL 3740632 (Conn. Super. Ct. Oct. 13, 2009).

The notice provided to Appellant was sufficient to inform him of the default and his rights pursuant to the default. Appellant does not deny that he received actual notice of the Respondent’s intent to foreclose, nor does Appellant claim that he had no notice of his rights in relation to the Notice of Intention to Foreclose. Appellants now seeks to have

the foreclosure and Master-in-Equity's Foreclosure Judgment set aside on a technicality with the language of a notice document, despite the fact that the language did not put him at a disadvantage, nor did it discourage him from asserting his defenses to the foreclosure in the foreclosure proceeding. It would, instead, appear that the Notice of Intention to Foreclose had its intended effect.

### CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, Respondent respectfully requests that the Court affirm the Master's Judgment of Foreclosure and Sale entered on March 18, 2013 and Order Denying Defendant's Motion to Reconsider entered on May 15, 2013.

Respectfully submitted,



---

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Attorneys for Respondent HSBC Bank  
USA, National Association, as Trustee for  
MLCC 2007-2

February 7, 2014

In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

SC Court of Appeals

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2013-001412

HSBC Bank USA, National Association, as  
Trustee for MLCC 2007-2 .....Respondent,

vs.

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

Of whom

S. Russell Fielden and Deborah M. Fielden, are..... Appellants.

**RESPONDENT’S DESIGNATION OF MATTER TO BE  
INCLUDED IN THE RECORD ON APPEAL**

Respondent HSBC Bank USA, National Association, as Trustee for MLCC 2007-2  
proposes the following matter for inclusion in the Record on Appeal:

1. Lis Pendens, Summons and Complaint (Docket No. 2010-CP-07-2927 – filed July 14, 2010;
2. Order of Reference – filed August 13, 2010;
3. Appellants’ Motion to Dismiss – filed July 14, 2010;
4. Appellants’ Motion to Dismiss 12(b)(6) or Summary Judgment – filed November 29, 2010;
5. Appellants’ Answer and Counterclaim – filed November 29, 2010;
6. Respondent’s Reply to Appellants’ Answer and Counterclaim - filed December 22, 2010;
7. Appellants’ Motion to Dismiss – filed February 14, 2013;
8. Respondent’s Memorandum of Law – filed February 18, 2013;
9. Judgment of Foreclosure and Sale and Notice of Sale – filed March 18, 2013;
10. Appellants’ Motion to Reconsider or in the Alternative Alter Judgment on Behalf of Plaintiff – filed March 20, 2013;

11. Report on Sale – filed July 22, 2013;
12. Order Denying Defendant’s Motion to Reconsider - filed on May 15, 2013;
13. Transcript of Hearing dated February 18, 2013 with Exhibits 1, 2, 3 and 5;
14. Transcript of Hearing dated April 15, 2013.

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

February 7, 2014



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In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2013-001412

HSBC Bank USA, National Association, as  
Trustee for MLCC 2007-2 .....Respondent,

vs.

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

Of whom

S. Russell Fielden and Deborah M. Fielden, are..... Appellants.

**PROOF OF SERVICE**

I HEREBY CERTIFY that I have served the **INITIAL BRIEF OF THE RESPONDENT and RESPONDENT’S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on Appellants S. Russell Fielden and Deborah M. Fielden and other Defendants by depositing copies of it in the United States Mail, postage prepaid, on February 7, 2014, at the addresses shown on the attachment listing Other Counsel of Record and Parties.

February 7, 2014



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LICENSED IN SOUTH CAROLINA



February 7, 2014

The Honorable Jenny Abbott Kitchings  
The South Carolina Court of Appeals Clerk of Court  
1015 Sumter Street  
Columbia, South Carolina 29201

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SC Court of Appeals

RE: HSBC Bank USA, National Association, as Trustee for MLCC 2007-2 v. S. Russell Fielden; Deborah M. Fielden; CoastalStates Bank AND Coastal State Bank v. S. Russell Fielden and Deborah M. Fielden  
Appellate Case # 2013-001412  
Civil Action# 2010-CP-07-2927  
Our File # 511227.448

Dear Ms. Kitchings:

Enclosed are the original and seven (7) copies of the Initial Brief of the Respondent and Respondent's Designation of Matter to be included in the Record on Appeal, along with a Proof of Service. Please return a filed copy of the documents to me in the enclosed self-addressed, postage pre-paid envelope provided for your convenience.

By copy of this letter, I am serving a copy of the Initial Brief of the Respondent and Respondent's Designation of Matter to be included in the Record on Appeal and Proof of Service on all parties to this appeal.

Thank you for your assistance in this matter.

With kind personal regards, I am

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Charles", written in black ink.

Charles S. Gwynne Jr.

/dm  
Enclosures as stated

cc:

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