

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

The Honorable Robert E. Watson, Master in Equity

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Appellate Case No. 2014-000696  
Circuit Court Case No. 2011-CP-08-02434

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Deutsche Bank National Trust,..... Respondent,

v.

Eugene Elmore and Gwendolyn Elmore, ..... Appellants.

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INITIAL BRIEF OF RESPONDENT

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July 7, 2014

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**SC Court of Appeals**

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## **STATEMENT OF ISSUE**

Did the Master in Equity abuse his discretion when he refused to vacate a judgment foreclosing a note and mortgage secured by Appellants' property when Appellants (1) defaulted at the trial level, (2) did not preserve their appellate argument for this Court's review, and (3) provided no evidentiary or legal basis for undoing the trial court's foreclosure judgment?

## STATEMENT OF THE CASE

This matter was commenced on September 1, 2011, to foreclose on an unpaid note and mortgage in the principal amount of \$190,841 that was secured by Appellants' real property in Goose Creek. (R. pp. \_\_\_–\_\_\_, Summons and Complaint.) Process was served on Appellants on September 6, 2011. (R. pp. \_\_\_, \_\_\_, Affidavits of Service on Eugene Elmore and Gwendolyn Elmore.) They never answered or otherwise pled in response to the Complaint. (R. p. \_\_\_, Affidavit of Default.)

The Master in Equity held a final hearing on July 24, 2013, to resolve this matter, of which Appellants were provided notice. (R. pp. \_\_\_–\_\_\_, Notice of Final Hearing.) That same day, he entered a final judgment holding that Respondent had “a valid first lien on the subject property”; that Respondent “is the holder of the note and mortgage”; and that Respondent was due \$220,124, plus interest accruing as provided in the note, as of July 24, 2013. (R. pp. \_\_\_–\_\_\_, Master in Equity's Report and Judgment of Foreclosure and Sale.) Accordingly, he ordered the property to be sold at public auction. (*Id.*)

The property was sold at auction on November 6, 2013. (R. pp. \_\_\_–\_\_\_, Order and Report of Receipts and Disbursement of Funds.) On November 13, 2013, the Master in Equity issued a foreclosure deed regarding Appellants' property and executed a satisfaction of mortgage. (R. p. \_\_\_, Master in Equity's Foreclosure Deed; R. p. \_\_\_, Satisfaction of Mortgage by Foreclosure.)

The case, by all accounts, was over. However, on January 17, 2014—nearly six months after the Master in Equity entered judgment resolving this case, and over two months after the property was sold at auction—Appellants entered their first appearance in this case by filing a “Motion for Emergency Hearing to Vacate Judgment.” In their

motion, Appellants argued that Respondent was not authorized to foreclose on their property because Wells Fargo Bank, N.A., had been the servicer of their note. (R. pp. \_\_\_–\_\_\_, Motion for Emergency Hearing to Vacate Judgment.) They also asked the Master in Equity to “[t]ake judicial notice” of the bizarre proposition that “once a debtor signs a Promissory Note, the debtor has no further obligation to the Note because the Note has become a check.” (R. p. \_\_\_, *id.*)<sup>1</sup> On February 20, 2014, they amended their motion to state that they were also “the verified holder of an attached perfected security interest,” though they provided no explanation for this contention. (R. p. \_\_\_, Amended Motion for Emergency Hearing to Vacate Judgment.)

On February 27, 2014, the Master in Equity held a hearing on Appellants’ post-judgment motion. On March 7, 2014, he denied their motion, finding that Appellants had not presented anything that should undo the foreclosure judgment. (R. pp. \_\_\_–\_\_\_, Order Denying Defendants’ Motion to Vacate Judgment.)

Despite the Master in Equity’s foreclosure judgment and subsequent denial of Appellants’ efforts to undo that judgment, Appellants have refused to leave the property. Accordingly, on March 17, 2014, the Master in Equity issued a Rule to Show Cause requiring Appellants to explain why they have refused to leave the property in light of the judgment and foreclosure sale over four months earlier. (R. p. \_\_\_, Rule to Show Cause.) Appellants filed their Notice of Appeal on March 31, 2014, prior to any hearing on the Rule to Show Cause. (R. p. \_\_\_, Notice of Appeal.)

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<sup>1</sup> Neither of these points has any legal basis whatsoever. However, because Appellants did not argue either issue in their opening brief, they are abandoned. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (“Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue.”).

## STANDARD OF REVIEW

This appeal arises from Appellants' challenge to the Master in Equity's refusal to vacate a final judgment, which is governed by Rule 60(b), SCRPC. The grant or denial of a motion under that rule is within the trial court's sound discretion, and this Court will review such decisions only for an abuse of discretion. *Se. Hous. Found. v. Smith*, 380 S.C. 621, 636, 670 S.E.2d 680, 688 (Ct. App. 2008). There is no such abuse here.

## ARGUMENTS AND AUTHORITIES

### **I. The only issue discussed in Appellants' opening brief is not preserved for this Court's review.**

According to Appellants' opening brief, the Master in Equity erred in granting judgment in Respondent's favor because Appellants' themselves have a superior security interest in the property by virtue of simply living there. This, of course, is not the law. But even if it was, Appellants' argument was not properly preserved for review, and the Court need not go any further to resolve this appeal.

As is well established, this Court can only consider issues on appeal that have been preserved. *See, e.g., Elam v. S.C. DOT*, 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004) (reiterating "the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration" as a prerequisite for appellate review). In order for an argument to be preserved for appeal, it must have been both "raised to and ruled on by the lower court." *Id.* at 23–24, 602 S.E.2d at 779–80. The burden of demonstrating that an issue has been preserved falls to Appellants. *See State v. Freeman*, 319 S.C. 110, 122, 459 S.E.2d 867, 874 (Ct. App. 1995) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review.").

There is simply no way that Appellants can carry this burden here. Nothing in the record indicates that the argument presented in Appellants' opening brief was ever made to, much less ruled on, by the Master in Equity. In fact, neither the Master's foreclosure judgment nor his denial of Appellants' motion to vacate that judgment ever address the topic discussed in Appellants' opening brief.

Nor can Appellants sidestep this fundamental requirement of appellate law by relying on their status as *pro se* litigants. The obligation to present an adequate appellate record and demonstrate that an issue has been preserved applies to equally to *pro se* and represented parties. *See, e.g., Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 187, 426 S.E.2d 114, 116 (Ct. App. 1992) (rejecting a *pro se* appellant's arguments because "there is no transcript of the summary judgment hearing and no mention of this argument in the trial judge's order" to demonstrate that the issue had been properly preserved, and noting that the burden to present an adequate appellate record lies with the appellant), *aff'd*, 314 S.C. 352, 444 S.E.2d 508 (1994).<sup>2</sup> Because Appellants' only argument is not preserved for this Court's review, the Master in Equity's ruling should be affirmed.

**II. Because Appellants did not present any basis for vacating the foreclosure judgment, the Master in Equity did not abuse his discretion in denying Appellants' post-judgment motion.**

If the Court finds that Appellants properly preserved their argument for review, it should still affirm the Master in Equity's decision not to vacate its prior judgment because there is simply no defect, legal or factual, in that judgment.

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<sup>2</sup> To date, Appellants have not designated any matter for inclusion in the record on appeal, a filing that they were required to submit contemporaneously with their opening brief. Rule 209(a), SCACR.

Rule 60(b), SCRCP, identifies a series of circumstances under which a trial court can undo a final judgment, including “excusable neglect” by the moving party, “newly discovered evidence” that renders the earlier judgment doubtful, or when the earlier judgment was procured by fraud or other misconduct. The party seeking to vacate a judgment has the burden of providing evidence sufficient to support one of these grounds. *See McClurg v. Deaton*, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (Ct. App. 2008) (“A party making a motion under rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief.”), *aff’d*, 395 S.C. 85, 716 S.E.2d 887 (2011). This is a substantial burden, as South Carolina has “a strong policy towards finality of judgments.” *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004).

Nothing in Appellants’ opening brief supports vacating the trial court’s foreclosure judgment here. First, their argument—namely, that simply by living in and maintaining a home, they somehow obtained a security interest in the property that is superior to Respondent’s properly-recorded, first-position mortgage—is frivolous. (*See* Appellants’ Opening Br. at 1–2 (“For the claim of our Security Interest in the property would be \$87,000.00 per year that we lived in at this location, which only covers upkeep, maintenance and guard of property 24 hours, 365 days per year, and at minimum of \$8.00 per hour.”).) It has no support in law or even common sense.

Second, even if there was a scintilla of legitimacy to Appellants’ argument, their “evidence” would have been known at the time the foreclosure judgment was rendered, as their so-called “security interest” is based on the continuous occupancy of the property, including at the time that the Master in Equity entered judgment. As such, this is not “newly discovered” evidence that can trigger Rule 60(b). *See, e.g., Lanier v.*

*Lanier*, 364 S.C. 211, 218–19, 612 S.E.2d 456, 459–60 (Ct. App. 2005) (holding that “evidence is not newly discovered evidence” under Rule 60(b) when the party was aware of and possessed the information at the time that the earlier judgment was rendered).

Accordingly, the Master in Equity did not abuse his discretion when he denied Appellants’ motion to vacate the foreclosure judgment. That ruling should be affirmed.

**CONCLUSION**

Nothing in the record suggests any error committed by the trial court, nor did Appellants actually preserve for this Court’s review the only issue discussed in their opening brief. Accordingly, Respondent respectfully submits that the Maser in Equity’s denial of Appellants’ motion to vacate the foreclosure judgment should be affirmed.

Respectfully submitted,

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July 7, 2014

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**PROOF OF SERVICE**


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I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice, LLP, Attorneys for Respondent, Deutsche Bank National Trust, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same to the following address(es):

**INITIAL BRIEF OF RESPONDENT**

**PARTIES SERVED:**        **Eugene Elmore & Gwedolyn Elmore**  
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July 7, 2014

The Honorable Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
1015 Sumter Street  
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Re: Deutsche Bank National Trust, v. Eugene Elmore and Gwendolyn Elmore  
Appellate Case No. 2014-000696  
Circuit Court Case No. 2011-CP-08-02434

Dear Ms. Kitchings:

Enclosed please find Respondent's Initial Brief and Designation of Matter. Please file the originals and return a clocked copy to us.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

MTC/tm

cc: Eugene Elmore  
Gwendolyn Elmore

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