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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM ANDERSON COUNTY

HON. CORDELL MADDOX, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2013-001185

Deutsche Bank National Trust Company as Trustee for the MLMI Trust Series 2007-MLNI, RESPONDENT

V.

RHONDA BOOMS.....APPELLANT

APPELLANT'S FINAL BRIEF

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
HONORABLE CORDELL MADDOX

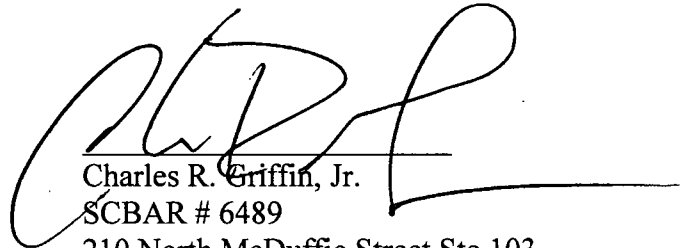
APPELLATE CASE NO.: 2013-001185

Deutsche Bank National Trust Company as Trustee for the MLMI Trust Series 2007-
MLNI ... Respondent

VS

Rhonda Booms, Appellant

FINAL BRIEF OF APPELLANT



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May 23, 2014

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STATEMENT OF ISSUES ON APPEAL

A. Did the Trial Court err in finding that Appellant did not present any evidence of actual damages resulting from the failure to be provided with the Attorney-Preference notice

B. Did the Trial Court err in finding that the maximum Appellant is permitted is a setoff of the foreclosure judgment in the maximum amount of \$7,500?

C. Did the Trial Court err in granting Respondent's motion in limine as to statements made by the mortgage servicer to Appellant since the mortgage servicer was an agent of the Respondent?

D. Did the Trial Court err in not finding that Appellant's actual damages include potential imputed income as a result of forgiveness of debt income by the Internal Revenue Service?

E. Did the Trial Court err in finding that Appellant did not present any evidence that the terms of the Note and/or Mortgage were unconscionable, as set forth in the South Carolina Consumer Protection Code?

F. Did the Trial Court err in failing to find that Respondent was not a holder in due course since it is undisputed that Respondent acquired the Note and Mortgage after the loan was in default?

G. Did the Trial Court err failing to find that Plaintiff was barred from recovery pursuant to the equitable doctrine of unclean hands since it was undisputed that the loan closing that was the subject of this action was not done under the supervision of a licensed South Carolina attorney as is required by law?

STATEMENT OF THE CASE

On or about October 25, 2006, Appellant made, executed and delivered a certain Adjustable Rate Note ("Note") payable in monthly installments. This mortgage loan transaction was a refinance of Appellant's residence located in South Carolina and the debt was incurred by Appellant primarily for personal, family or household purposes. Record P. 26, ¶ 4.

In order to secure the payment of the Note according to the terms and conditions thereof, Appellant made, executed and delivered unto Mortgage Lenders Network USA, Inc. Record P. 26, ¶ 5.

The loan was assigned from Mortgage Lenders Network USA, Inc to Respondent on December 18, 2007. Record P. 238, Lines 14 – 24.

This action was commenced by the filing and service of a Summons and Complaint seeking foreclosure of Appellant's residence in South Carolina. Record PP 18 – 19 ¶¶ 1, 6, 7, 8, and 9.

Appellant also alleged her amended answer that Respondent was barred from recovery pursuant to the Doctrine of Unclean Hands. Record P. 28 ¶ 11.

Appellant alleged that Respondent was not a holder in due course. Record P. 32 ¶ 15. The loan was in default when the loan was assigned to the Respondent. Record P 244, Lines 1 – 3.

Appellant alleged in her Counterclaim Mortgage Lenders Network USA, Inc. failed to ascertain Appellant's preference as to legal counsel as required by § 37-10-102 S.C. Code of Laws Ann. regarding the mortgage loan which is the subject of this action. Record P. 32 ¶ 13. Also, this loan closing occurred in Florida, and there was no

licensed South Carolina attorney present at that this loan closing. Record P. 190 Lines 5 – 20.

Appellant alleged in her Counterclaim that the aforementioned loan transaction which is the subject of this action was and is unconscionable within the meaning of § 37-10-105 S.C. Code of Laws Ann., and/or was induced by unconscionable conduct. Record P. 34 ¶ 25.

A trial was held before the Honorable Cordell Maddox (hereinafter Trial Court).

Prior to trial, Respondent's counsel made several Motions in Limine which were argued and addressed by the Trial Court. Record P. 132, Lines 6 – 25; Record PP 133 – 173.

The Trial Court granted Respondent's Motion since the loan servicer was not a party to this action. Record P. 153 Lines 16 – 17.

The Trial Court found that Appellant had not suffered any actual damages. Record P. 259, Lines 11 – 17.

According to Respondent's counsel, the Trial Court found that future tax liability cannot constitute actual damages. Record P. 98, Lines 21 – 24.

The Trial Court stated that the Trial Court did not find the loan unconscionable. Record P. 260 Lines 15 – 17.

The Trial Court granted Appellant's motion for a direct verdict on the issue of the violation of the attorney preference statute, S.C. Code Ann. § 37-10-102 and only awarded Appellant a penalty in the amount of \$7,500.00 to be used as an offset on the amount owed by Appellant to Respondent. Record P. 272, Lines 8 – 11.

The Trial Court granted Respondent's motion for a direct verdict motion for a foreclosure. Record P. 272, Lines 8 – 10.

Appellant filed a Motion to Reconsider which was denied by Order of the Trial Court.

Thereafter, Appellant initiated this Appeal.

ARGUEMENTS

A. Did the Trial Court err in finding that Defendant did not present any evidence of actual damages resulting from the failure to be provided with the Attorney-Preference notice?

The Court found that Appellant had not suffered any actual damages. Trial Record P. 259, Lines 11 – 17.

S.C. Code Ann. § 37-10-102 provides, in part, that:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -

(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

S.C. Code Ann. § 37-10-105 provides, in part;

Violations; civil actions.

(A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, **to recover actual damages** and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. (Bold Added)

Appellant's counsel moved for a directed verdict on the issue of the violation of the attorney preference statute, S.C. Code Ann. § 37-10-102. Record P. 272, Lines 3 – 7.

The Trial Court granted Appellant's motion for a direct verdict on the issue of the violation of the attorney preference statute, S.C. Code Ann. § 37-10-102 and awarded Appellant a penalty in the amount of \$7,500.00 to be used as an offset on the amount owed by Appellant to Respondent. Record P. 272, Lines 8 – 11.

MR. GRIFFIN: I think you ruled in our favor on the attorney preference statute and granted a directed verdict on that and then you set off a \$7500.00 maximum penalty.
THE COURT: Right.
Record P. 89, Lines 22 – 25.

Appellant testified that she wanted to be awarded damages and that a fair interest rate would be under 5% interest rate rather than the interest rate of 11% to 12%, which she had at the time of trial. Record P. 199, Lines 18 –25; Record P 200, Lines 1 – 5. Thus the inference is that Appellant has been damaged in that her property was encumbered by excessive finance charges.

Also, a mortgage was recorded in this case regarding the Plaintiff's property and a foreclosure action was instituted, thus the Appellant was damaged as a result thereof.

The execution and recording of a mortgage instrument and the subsequent foreclosure thereon constitutes damages.¹ Appellant's property was encumbered with finance charges of \$1,820,507.54 and the interest rate on the loan was %11.454. Record P. 244, Lines 17 – 23. Respondent has a security interest in Appellant's South Carolina residence as a result of the assignment of note and mortgage to Respondent. Record P. 247, Lines 16 – 18. Record 238, Lines 14 – 24. And the principal amount of the loan that was financed with the original lender, Mortgage Lenders Network, USA, Inc. was \$565,000.00. Record P. 237, Lines 9 – 23. Clearly, Appellant has been damaged in the amounts of the finance charges and the principal amount of the loan which have become a lien upon Appellant's property.

¹ "Here, on July 23, 2001, Wachovia's employees processed the home equity loan to Dr. Coffey without the supervision of an attorney. Their unauthorized practice of law resulted in prejudice to Mrs. Coffey when the mortgage signed by Dr. Coffey was recorded and when Wachovia filed this foreclosure action against Mrs. Coffey." **Wachovia Bank, N.A. v. Coffey**, 389 S.C. 68, 76 (S.C. Ct. App. 2010)

Additionally, Appellant's counsel raised the issue at trial that an element of Appellant's damages was imputation as taxable income. Record P. 150, Lines 17 – 21.

MR. GRIFFIN : Also , they have if they ' re not seeking deficient they -- deficiency , they -- she ' s got potential imputation of income based on the difference in the property and what it sells for , they ' re -- they ' ll 1099 her for the difference under the Federal Debt Cancellation Act .
Record P. 150, Lines 17 – 21.

Negative tax consequences are compensable as damages. *O'Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 446 (E.D. Pa. 2000).

Remedial statutes such as the South Carolina Consumer Protection Code should be liberally construed in order to accomplish the objectives sought. *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362 (S.C. 2009).

Tax liability is an economic damage. Actual damages recoverable under The South Carolina Unfair Trade Practices include special and consequential damages that are the natural and proximate result of the deceptive conduct. *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996).

26 USCS § 61(a)(12) provides:

(a) General definition. Except as otherwise provided in this subtitle gross income means all income from whatever source derived, including (but not limited to) the following items:

(12) Income from discharge of indebtedness.

26 USCS § 63(a) provides:

Taxable income defined.

(a) In general. Except as provided in subsection (b), for purposes of this subtitle, the term

"taxable income" means gross income minus the deductions allowed by this chapter.

Generally, Respondent is required to file a form 1099-C with the Internal Revenue service for each debtor for whom Respondent canceled a debt owed to Respondent of \$600 or more.

Federal law requires lenders that discharge a debt to report the discharge to the IRS by filing a Form 1099-C. 26 U.S.C. § 6050P(a) (2006); 26 C.F.R. § 1.6050P-1(a) (1) (2008). A lender that files a Form 1099-C with the IRS also must furnish the same information to the borrower. 26 U.S.C. 6050P(d) (1)-(2) (2006) . The issuance of a 1099-C may have tax implications for the lender and the borrower. See 26 U.S.C. § 165(a) (2006); 26 U.S.C. § 61(a)(12) (2006). The lender may take a loss, thereby reducing its gross income and tax liability, while the borrower must include cancelled debt in its gross income, thereby increasing its tax liability. See 26 U.S.C. § 165(a); 26 U.S.C. § 61 (a) (12).

Plaintiff's witness testified that the principal amount of the note and mortgage was five hundred and sixty thousand five hundred dollars. Record P. 237 Lines 12 – 17. Plaintiff's witness further testified that Appellant owed in excess of \$600,000.00 at the time of trial. Record P. 241 Lines 11 – 18.

Respondent's counsel stated that the value of the property was \$350,000 at the time of trial. Record P. 261 Lines 4 – 12.

Thus Appellant at the time of trial had a potential of \$250,000.00 in taxable income imputed to her thus increasing her tax liability, i.e., damages.

Clearly, Appellant suffered actual damages in addition to the statutory penalty awarded.

B. Did the Trial Court err in finding that the maximum Defendant is permitted is a setoff of the foreclosure judgment in the maximum amount of \$7,500?

The Trial Court only awarded Appellant a \$7,500.00 set off against the debt. Record P. 272, Lines 10 – 11.

As stated above negative tax consequences are compensable as damages. *O'Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 443, 446 (E.D. Pa. 2000)*.

Appellant's property was encumbered with finance charges of \$1,820,507.54 and the interest rate on the loan was %11.454. Record P. 244 , Lines 17 – 23. Respondent has a security interest in Appellant's South Carolina residence as a result of the assignment of note and mortgage to Respondent. Record p. 247 , Lines 16 – 18. Record P. 238, Lines 14 – 24. And the principal amount of the loan that was financed with the original lender, Mortgage Lenders Network, USA, Inc. was \$565,00.00. Record P. 237, Lines 9 – 23.

Clearly, Appellant has been damaged in the amounts of the finance charges and the principal amount of the loan which have become a lien upon Appellant's property, along with an award for the negative tax consequences and Appellant should have been entitled to a setoff of the amounts allegedly due and owing on the note and mortgage along with an award for the negative tax consequences.

C. Did the Trial Court err in granting Respondent's motion in limine as to statements made by the mortgage servicer to Appellant since the mortgage servicer was an agent of the Respondent?

The Trial Court granted Respondent's Motion since the servicer was not a party to this action. Record P. 253 Lines 16 – 17.

At the motion to reconsider hearing, Respondent's counsel admitted that the mortgage servicer was Respondent agent. Record P. 94 lines 16 – 17. Appellant's counsel proffered Appellant's testimony that servicer advised Appellant to quit making payments and to go into default, thus and they could do a loan modification after that. Trial Record P. 152 Lines 18 – 25; Record P. 153 Lines 1 – 3. Court granted Respondent's motion in Limine to exclude statements by servicer because servicer was not a party to this action. Record P. 153 Lines 16 – 17.

The proffered testimony would go to Appellant's defense of unclean hands since Respondent would be acting with unclean hands if Respondent initiated foreclosure action after servicing agent advised Appellant to quit making payments in order to begin the loan modification process.

D. Did the Trial Court err in not finding that Appellant's actual damages include potential imputed income as a result of forgiveness of debt income by the Internal Revenue Service?

According to Respondent's counsel, the Trial Court found that future tax liability cannot constitute actual damages. Record P. 98, Lines 21 – 24.

Remedial statutes such as the South Carolina Consumer Protection Code should be liberally construed in order to accomplish the objectives sought. *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362 (S.C. 2009).

Tax liability is an economic damage. Actual damages recoverable under The South Carolina Unfair Trade Practices include special and consequential damages that are the natural and proximate result of the deceptive conduct. *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996).

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Generally, Respondent is required to file a form 1099-C with the Internal Revenue service for each debtor for whom Respondent canceled a debt owed to Respondent of \$600 or more.

Federal law requires lenders that discharge a debt to report the discharge to the IRS by filing a Form 1099-C. 26 U.S.C. § 6050P(a) (2006); 26 C.F.R. § 1.6050P-1(a)(1) (2008). A lender that files a Form 1099-C with the IRS also must furnish the same information to the borrower. 26 U.S.C. 6050P(d) (1)-(2) (2006) . The issuance of a 1099-C may have tax implications for the lender and the borrower. See 26 U.S.C. § 165(a) (2006); 26 U.S.C. § 61(a)(12) (2006). The lender may take a loss, thereby reducing its gross income and tax liability, while the borrower must include cancelled debt in its gross income, thereby increasing its tax liability. See 26 U.S.C. § 165(a); 26 U.S.C. § 61 (a)(12).

Respondent's witness testified that the principal amount of the note and mortgage was five hundred and sixty thousand five hundred dollars. Record P. 237 Lines 12 – 17.

Respondent's witness further testified that Appellant owed in excess of \$600,000.00 at the time of trial. Record P. 241 Lines 11 – 18. Respondent's counsel stated that the value of the property was \$350,000 at the time of trial. Record P. 261 Lines 4 – 12. Thus Appellant at the time of trial had a potential of \$250,000.00 in taxable income imputed to her thus increasing her tax liability, i.e., damages.

Appellant is entitled to an award for negative tax consequences.

E. Did the Trial Court err in finding that Appellant did not present any evidence that the terms of the Note and/or Mortgage were unconscionable, as set forth in the South Carolina Consumer Protection Code?

S.C. Code Ann. § 37-10-105 (C) provides:

If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action:

- (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;
- (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;
- (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or
- (4) award:
 - (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;
 - (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
 - (c) attorney's fees and costs.

The Court stated that the Court did not find the loan unconscionable. Record P. 260 Lines 15 – 17.

Unconscionable is defined as "shockingly unfair or unjust." *Love Pontiac, Cadillac, Buick, GMC Truck, Inc. v. GMC*, 1999 U.S. App. LEXIS 3769 (4th Cir. S.C. Mar. 10, 1999).

Appellant testified that a fair interest rate would be under 5% interest rate rather than the interest rate of 11% to 12%, which she had at the time of trial. Record P. 199, Lines 18 –25; Record P. 200, Lines 1 – 5.

Respondent presented no evidence to rebut this testimony. Further, given the fact that was undisputed no attorney was present at the closing, thus was induced by unconscionable conduct.

It is undisputed that there was no attorney at the closing. Record P. 190 Lines 5 – 20. And no attorney reviewed the documents with Appellant at closing. Record P. 194, Line 25; Record P. 195, Line 1. Appellant further testified that she was not pleased with the mortgage and she did not understand the documents at the time she signed the documents at the closing. Record P. 199, Lines 5 – 9. Appellant further testified that a fair interest rate would have been under 5% when the note provided for an interest from 11% to 12%.² Record p. 199, Lines 18 –25; Record P. 200, Lines 1 – 5.

“As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney. *See State v. Buyers Serv. Co.*, 292 S.C. 426, 431-434, 357 S.E.2d 15, 18-19 (1987) *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75 (S.C. Ct. App. 2010).”

F. Did the Trial Court err in failing to find that Respondent was not a holder in due course since it is undisputed that Respondent acquired the Note and Mortgage after the loan was in default?

The loan was in default when the loan was assigned to the Respondent. Record P 244, Lines 1 – 3.

² The interest rate on the loan was %11.454. Record P. 244 , Lines 17 – 23.

Under S.C. Code Ann. § 36-3-3-2, (1) A holder in due course is a holder who takes the instrument(a) for value; and (b) in good faith; **and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.** ... A person has notice of a fact when he has actual knowledge or notice or, from all the facts and circumstances known to him at the time in question, he has reason to know that it exists. S.C. Code Ann § 36-1-201(25). "Good faith" means honesty in fact in the conduct or transaction concerned. S.C. Code Ann. § 36-1-201(19). *Specialty Flooring Co. v. Palmetto Federal Sav. Bank*, 302 S.C. 107, 111 (S.C. Ct. App. 1990). (Bold added).

Thus it is obvious Respondent is not a holder in due course and is subject to any claims and defenses that Appellant has or had against the original mortgagee.³

G. Did the Trial Court err failing to find that Plaintiff was barred from recovery pursuant to the equitable doctrine of unclean hands since it was undisputed that the loan closing that was the subject of this action was not done under the supervision of a licensed South Carolina attorney as is required by law?

Appellant testified that no attorney was present at the closing, which occurred in Florida at Appellant's house in Florida. Record P. 190 Lines 5 – 20. Appellant testified that the only people present at the closing were a notary, her husband and herself. Record P. 194, Lines 16 – 18. Additionally Appellant testified that no attorney reviewed the closing documents with her at the closing. Record P. 194, Line 25; Record P. 195, Line 1.

Appellant further testified that she was not pleased with the mortgage and she did

³ "We find the trial judge properly concluded Specialty was not a holder in due course of the bank check. It thus took the instrument subject to the defense of failure of consideration" *Specialty Flooring Co. v. Palmetto Federal Sav. Bank*, 302 S.C. 107, 111 (S.C. Ct. App. 1990).

not understand the documents at the time she signed the documents at the closing.

Record 199, Lines 5 – 9.

“The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75 (S.C. Ct. App. 2010).”

“As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney. See *State v. Buyers Serv. Co.*, 292 S.C. 426, 431-434, 357 S.E.2d 15, 18-19 (1987) *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75 (S.C. Ct. App. 2010).”

Appellant’s attorney argued to the Court that the doctrine of unclean hands precluded Respondent from foreclosing on the mortgage since there was no attorney present at closing as required by South Carolina Law. Record P. 90, Lines 1 – 25; Record P. 91, Lines 1 – 6.

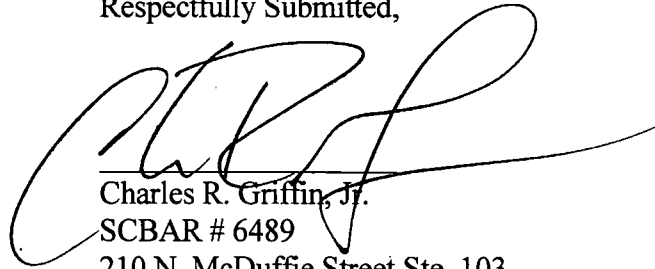
MR. GRIFFIN: Yes, sir. They closed in Florida and no attorney was present and there's another issue about unclean hands, about whether or not they could even foreclose given the fact that the South Carolina Supreme Court issued, the Court of Appeals and the South Carolina Supreme Court, has issued some blistering opinions about attorneys not being present at closings and not allowing a lien holder to foreclose as a result thereof. This is a classic case. There was no, all the testimony was that there was no attorney present, no South Carolina attorney present in Florida. I believe, at the most, there may have been some telephone conversations with an attorney here in South Carolina. I don't think that brings it to the level of attorney presence.
Record P. 89, Lines 3 – 15.

“The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.... We therefore reach the inescapable conclusion that Wachovia has come to court with unclean hands and is barred from seeking equitable relief.” *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 76 (S.C. Ct. App. 2010).

CONCLUSION

For the reasons stated above, the Appellant asks that the Order of the Court appealed from be reversed for the reasons stated herein.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to read 'CRG', is written over the typed name and address.

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May 23, 2014

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HON. CORDELL MADDOX, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2013-001185

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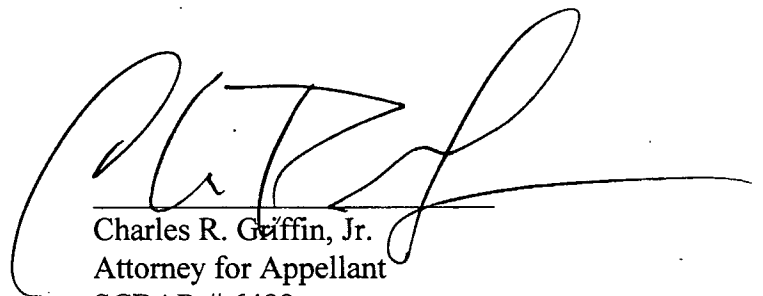
DEUTSCHE BANK.....RESPONDENT

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RHONDA BOOMS.....APPELLANT

CERTIFICATION

Certificate of Counsel. I certify that the Final Brief complies complies with Rule 211(b). SCACR



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Dated: May 23, 2014

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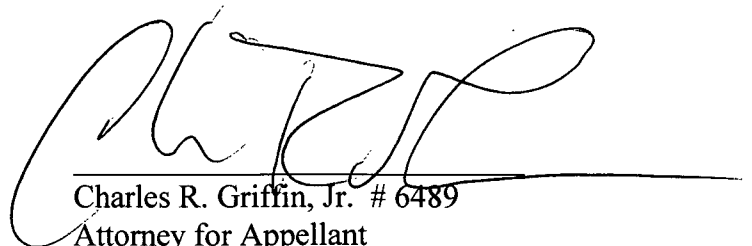
CERTIFICATE OF SERVICE OF APPELLANT'S FINAL BRIEF

The undersigned does hereby certify that on June 17, 2014, he served a copy of the Appellant's Final Brief on the Respondent by depositing a copy of same in the U.S. Mail with postage prepaid addressed to the following:

Robert A. Muckenfuss
Attorney for Respondent
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Charlotte, NC 28202

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