

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master in Equity

**RECEIVED**

AUG 18 2014

**S.C. Supreme Court**

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Case No. 2010-CP-23-3860  
Appellate Case No. 2013-00915

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Independence National Bank ..... Petitioner,

v.

Buncombe Professional Park, LLC; and David DeCarlis,  
s/a David D. DeCarlis ..... Respondents.

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**BRIEF OF RESPONDENTS**

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Mary Leigh Arnold  
MARY LEIGH ARNOLD P.A.  
749 Johnnie Dodds Blvd. Suite B  
Mount Pleasant, S.C. 29464  
Phone: (843) 971-6053  
Facsimile: (843) 971-6055  
Email: [sammie@maryarnoldlaw.co](mailto:sammie@maryarnoldlaw.co)  
Attorney for Respondents

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## STATEMENT OF THE CASE

The transaction which is the subject of this case involves the execution of a mortgage by Buncombe Professional Park, LLC. (hereinafter “Buncombe” or jointly with DeCarlis “Respondents”) on September 25, 2007 in favor of Petitioner, Independence National Bank (hereinafter “Independence” or “Petitioner”). The subject mortgage is and was junior and subordinate to a mortgage of record dated May 25, 2006 on the same real property issued in favor of Respondent, David DeCarlis (hereinafter “DeCarlis” or jointly with Buncombe “Respondents”).

Independence issued a loan commitment to Buncombe on September 11, 2007. (App. 22-26). The loan commitment identifies Buncombe as the Borrower. (App. 22-26). The loan commitment requires that Independence receive a mortgage insurance title policy insuring Independence for a first mortgage lien. (App. 24). Independence received the title insurance policy. The loan commitment does not speak to a requirement of a subordination agreement. (App. 22-26).

On September 25, 2007, at the time of the closing conducted by Thomas F. Dugas, Esquire (App. 115-129), Buncombe executed a Commercial Promissory Note in favor of Independence in the amount of \$1,650,000.00. (App. 71-72). The Commercial Note was signed by Buncombe by and through its member, DeCarlis. (App. 30). A mortgage securing the promissory note was executed on the same date encumbering real property generally described as 4.68 acres South Buncombe Road, Greenville, South Carolina (hereinafter “Mortgage”). (App. 75-81). The Mortgage was signed by the owner of the property, Buncombe, by and through its member, DeCarlis. (App. 38). The

Mortgage was prepared by Independence (App. 80). The Mortgage does not speak in terms of its priority over any other lien or mortgage.

At the time of closing the Commercial Promissory Note was individually guaranteed by DeCarlis. (App. 41-42). A separate guaranty agreement was executed on the same day as the Commercial Promissory Note, and was signed by DeCarlis in his individual capacity. (App. 42).

Dugas was counsel and represented Independence, Buncombe and DeCarlis with regard to the transaction. (App. 129). Prior to the closing on September 14, 2007, Dugas had a title search conducted. (App. 117, 134). The title search clearly revealed the fact that a mortgage had been issued by Buncombe in favor DeCarlis in 2006 and was filed and of record. (App. 117-118, 134). Indeed at the time of the closing and filing of the subject Mortgage, with prior knowledge of Dugas the dual agent for all parties, the public record revealed the mortgage recorded on May 25, 2006, in the Greenville County RMC Office at Book MO 4571, page 1071-1073, from Buncombe in favor of DeCarlis. (hereinafter "DeCarlis Mortgage")(App. 118, 130). Notwithstanding, this first and superior mortgage DeCarlis was not asked at the time of the closing to sign a subordination agreement. (App. 126).

Several years following the execution of the original Note and Mortgage, on April 1, 2009, Buncombe executed and delivered to Independence a Change in Terms Agreement. (App. 160-161). The Change in Terms agreement extended out the maturity date to March 25, 2010, but again did not address the priorities between the two mortgages. (App. 160-161). On or about March 29, 2010, approximately three (3) years after the closing, Dugas, the closing lawyer, wrote to DeCarlis's counsel and asked that

DeCarlis execute a subordination agreement. (App. 128). DeCarlis declined to do so. (App. 128. 158-159).

On May 14, 2010, Independence filed a Complaint against Buncombe and DeCarlis. (App.17-21). The Complaint consists of fourteen (14) paragraphs but contains no designated cause of action. (App. 17-21). The Complaint did not set forth a cause of action for reformation. (App. 17-21). The phrase equitable subrogation is used in one instance. (App. 21). On June 18, 2010, Respondents filed an Answer and Counterclaim specifically challenging the priority of Independent's mortgage. (App. 43-51). On March 23, 2011, Independence filed a motion to amend the Complaint. (App. 2). The motion to amend was granted over Respondents' objection on April 7, 2011, a few weeks prior to trial. (App. 2). The first cause of action asserted in the amended pleading jumbles the causes of action of foreclosure and suit on a guaranty. (App. 58-63). The Amended Complaint included a new cause of action for reformation delineated as a second cause. (App. 63). Paragraph XVII provides: The documents in question were prepared by the closing attorney, who was engaged by the Defendant but was working as a common agent for the purposes of the real estate closing." (App. 63). Again, as in the initial complaint, a cause of action for equitable subrogation was not set forth; rather the phrase equitable subrogation was used in a single instance. (App. 62). Respondents timely filed their amended Answer and Counterclaim. (App. 86-94).

A hearing was held before the Honorable Charles B. Simons, Jr., Master in Equity for Greenville County, on April 29, 2011. (App. 4). Following the hearing, on May 13, 2011, the Court entered an Order of Foreclosure prepared by Independence. (App. 4-13). On May 23, 2011, Independence filed a Motion to Alter or Amend the Order of

Foreclosure to include a ruling on equitable subrogation. (App. 96). On May 24, 2011, Respondents filed a Motion to Reconsider. (App. 98-100). Respondents objected to altering the Order on a number of grounds including the argument that equitable subrogation was never pled by Independence. Following a telephone conference hearing held on May 27, 2011, again over the objection of Respondents, the Master in Equity allowed the Order to be amended to include a determination as to equitable subrogation and denied Respondents post-trial relief. (App. 14-16).

Respondents timely filed a Notice of Appeal challenging the rulings of the Master in Equity. After briefing and argument, the Court of Appeals found the Master-in-Equity had committed error in several instances and reversed the rulings with regard to reformation and equitable subrogation. (App. 225-233). First the Court of Appeals recognized that without reference to any other statute or doctrine, DeCarlis' lien was entitled to superior status over Independence's lien pursuant to S.C. Code Ann. §30-7-10 (2007). (App. 229). It went on however to address the specific doctrines of reformation and equitable subordination. The Court of Appeals held that Independence failed to prove by "clear and convincing evidence a 'meeting of the minds' in order to merit reformation of the mortgage. (App. 230). The Court held "DeCarlis was not a party to the mortgage and reformation does not permit him a court to write a new, additional party into the mortgage to correct the error." (App. 230). Additionally, the Court of Appeals opined Independence had actual knowledge of the pre-existing mortgage through its agent and therefore was not entitled to relief under the theory of equitable subrogation. (App. 232).

Independence petitioned for rehearing (App. 234-241), which petition was denied on April 18, 2013. (App. 242). This Court granted certiorari on May 8, 2014.

## **SUMMARY OF THE ARGUMENT**

The Court of Appeals correctly reviewed the lower courts' rulings and properly applied the law. Contrary to what Petitioner is now asking this Court to do, the Court of Appeals did not stretch any principle of law to reach its decision. The Court of Appeals recognized Independence failed to establish by clear and convincing evidence a meeting of the minds and that under well-established principles a court cannot create a new contract or add a party to a mortgage to correct an error. Petitioner now attempts to confuse issues by, for the first time, suggesting that a person that has no ownership interest in real property is imputed as a party to a mortgage because they executed certain transactional documents in a separate capacity "thereby empowering the courts to reform the real estate transaction." This defies the elements of reformation.

Additionally, the Court of Appeals correctly addressed the theory of equitable subrogation. As hard as Petitioner may now attempt to misdirect the Court, in the present case, it is undisputed that the existence of the DeCarlis Mortgage was known by all parties by means of their common agent. The Court of Appeals correctly recognized this fact and properly held in this instance equitable subrogation was not appropriate. Thus, the Court of Appeals decision should be upheld.

## **ARGUMENT**

- I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE MORTGAGE COULD NOT BE REFORMED.**
  - A. THE MORTGAGE CANNOT BE REFORMED TO INCLUDE AN ADDITIONAL PARTY WITH NO INTEREST IN REAL PROPERTY.**

Within an action for reformation “the complaining party must show, by clear and convincing evidence, 'a mutual mistake; that both parties intended a certain thing; and that by mistake in drafting of the paper did not get what both parties intended.'" George v. Empire Fire and Marine Ins. Co., 336 S.C. 206, 519 S.E. 2d (Ct. App. 1999); quoting, Hann v. Carolina Casualty Ins. Co., 252 S.C. 518, 527-28, 167 S.E.2d 420, 424 (1969). "[T]he bedrock of the right to reformation [is] a meeting of the minds of the contracting parties which results in an agreement antecedent to the formal contract, which later fails through mutual mistake to conform to the agreement." Kaiser v. Carolina Life Ins. Co., 219 S.C. 456, 467, 65 S.E.2d 865, 869 (1951). The contract may be reformed on the ground of mutual mistake when the mistake consists of the omission or insertion of some material element affecting the subject matter or when the terms and stipulations of the contract are inconsistent with those of the parol agreement that preceded it. Crosby v. Protective Life Ins. Co., 293 S.C. 203, 359 S.E.2d 298 (Ct.App.1987).

The Court of Appeals correctly reversed the Master in Equity’s determination to reform a mortgage to provide for priority by in essence adding a party. Moreover, the Court of Appeals correctly determined that a mortgage cannot be reformed to add a party in order to correct for the total absence of another document. (App. 230). Courts are not at liberty to write or make new contracts for parties. See Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C.636,643,216 S.E,2d 547, 550 (1975) (stating "[T]he parties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties. "); Lewis v. Premium Inv. 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); and, E. Bus. Forms, Inc. v. Kistler. 258 S.C.

429, 189 S.E.2d 22 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter).

In an effort to challenge the Court of Appeals holdings, Independence for the first time now argues that all the documents relating to the transaction must be read and construed as one. It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E. 2d 731 (1998). This argument was not previously raised nor properly preserved.

In support of its new proposition, Independence cites to a number of cases but most heavily relies on the case of Klutts Resort Realty, Inc. v. Down-Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977). It appears that Independence stretches the principles enunciated in Klutts creating a fallacy in the argument now being present. Notwithstanding, Klutts cannot be read to support the proposition “[b]y executing the business loan agreement in his individual capacity, DeCarlis expressly agreed to be a party to the mortgage.” (Petitioner Brief, p. 13).

This Court in Klutts held “[t]he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together.” Klutts, 268 S.C. at 88, 232 S.E.2d at 24. Additionally, this Court held “[c]onstruing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.” Id. at 88-89,

232 S.E.2d at 24. Contrary to Petitioner's position, Klutts does not support the contention that a court can add a party to a mortgage through reformation. First the concepts set forth in Klutts are principles to be employed in the construction of contracts. This Court has held that rules of construction do not apply where a parties seeks reformation of a contract. See Progressive Max Insur. Com. v. Floating Caps, Inc. 405 S.C. 35, 747 S.E. 2d 178 (2013). Klutts and the rules of contract construction are inapposite here.

The Court of Appeals correctly determined reformation was not available in the present circumstances. First, it does not appear the Petitioner takes issue with the Court of Appeals determination that Independence failed to establish by clear and convincing evidence a meeting of the minds in order to establish reformation.<sup>1</sup> See Hann v. Carolina Casualty Ins. Co., 252 S.C. 518, 527-28, 167 S.E.2d 420, 424 (1969) (quoting Sullivan v. Moore. 92 S.C. 305, 305, 75 S.E. 497, 497 (1912). "[T]he bedrock of the right to reformation [is] a meeting of the minds of the contracting parties which results in an agreement antecedent to the formal contract, which later fails through mutual mistake to conform to the agreement." Kaiser v. Carolina Life Ins. Co., 219 S.C. 456, 467, 65 S.E.2d 865, 869 (1951). There being no meeting of the minds there should have been no reformation.

Second the Court of Appeals properly recognized the distinction between the parties. Independence sought to reform the mortgage between it and Buncombe. DeCarlis, having no ownership interest in the real property securing the mortgage, was

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<sup>1</sup> Respondents take the position that the argument now employed by Petitioner in fact shows no meeting of the minds existed. Petitioner attempts to boot strap its way into reformation by claiming a person should be made a party to a mortgage by inference because they executed other transactional documents. Inference does not establish a meeting of the minds by clear evidence.

not a party to the mortgage. The lower court did not have the power to add DeCarlis to the mortgage as Independence requested. See House v. McMullen, 9 Cal. App. 664 (D. Ct. App. Cal. 1909) ("While a court of equity will reform contracts under many varying circumstances, still it has no power to make a new contract. Its power is simply to reform a contract already made. J.W. Mabb is not a party to the contract, and a court of equity can neither add additional parties nor substitute other parties for those already appearing upon the face of the writing."); Davis v. Reynolds, 154 Ark. 101; 241 S.W. 379 (Ark. 1922) ("A court of equity cannot add parties to or substitute other parties for those named in the contract."); 66 Am. Jur. 2d Reformation of Instruments §51 (2011).

Parties have the right to make their own contracts. See, e.g., Lewis v. Premium Inv. 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); E. Bus. Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter.). The priority of two different mortgages upon the same piece of real estate may be switched or substituted for one another by agreement of the parties, however "[b]ecause it alters the normal priority of the mortgagees, priority under a subordination agreement is strictly limited by the express terms of the agreement." Citizens & Southern Nat'l Bank v. Smith, 277 S.C. 162, 164, 284 S.E.2d 770, 771 (S.C. 1981).

"Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties." Crosby v. Protective Life Ins. Co., 293 S.C. 203, 359 S.E. 2d 298 (Ct. App. 1987). Problematic here is that Independence sought the reformation of the mortgage. A mortgage to which DeCarlis was not a party. Based on

the circumstances here, the issue should not have been reformation of the mortgage but rather reformation of a subordination agreement. Fatal to that concept however is the fact that a separate agreement to subordinate was never received. Thus there was no agreement of parties to reform. The Master in Equity erred because his determination creates or imposes a new contract on the parties which they themselves did not enter into or existed. The Master in Equity did not just rewrite a contract but imposed upon DeCarlis a contract that did not exist. A contract that does not exist cannot be reformed. The Court of Appeals correctly determined the Master in Equity erred in reforming the mortgage to change the priority when the true error was the failure to obtain a subordination agreement.

**B. THERE NEVER HAVING BEEN AN ISSUE OF FRAUD REFORMATION WAS NOT AVAILABLE.**

Again Petitioner raises new issues before this Court never addressed below and not properly before the Court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E. 2d 731 (1998). Petitioner now cites to the case of Aiken Petroleum Co. v. Nat'l Petroleum Underwriters for the position that reformation was justified under the ‘universal rule that reformation of a written instrument may be obtained where there is mistake on the part of the plaintiff, and inequitable conduct, deceit, concealment and imposition of fraud on the part of the defendant, including plaintiff’s mistake.’ 207 S.C. 236, 36 S.E. 2d 380 (1945). Independence argues that the lack of evidence in the record that DeCarlis revealed his mortgage to Independence or the dual agent warrants “an additional ground for reviewing the Court of Appeals decision.” (Petitioner Brief, p. 17). This argument lacks merit.

Fraud has never been alleged in this case or been an issue in the case. No evidence can be cited in the record that remotely establishes the elements of fraud. See

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010)("To prevail on a cause of action for fraud, a [p]laintiff must prove by clear, cogent and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury."). The alleged failure to disclose a mortgage of public record does not constitute fraud. Petitioner's newly contrived argument does apply in these circumstances.<sup>2</sup>

Here there was no mistake by Petitioner just a failure to act. Independence had the opportunity to learn of any encumbrance of record. Independence did in fact have a title search performed of public records through its agent Dugas. (App. 117, 134). Dugas undisputedly learned of and knew of the DeCarlis mortgage prior to closing. (App. 118, 128, 130). Independence is charged with the knowledge of its agent. See Spence v. Spence, 368 S.C. 106, 628 S.E. 2d 869 (2006). Independence failed to insured it was receiving what it desired. Independence's failure to act does constitute fraud on the part of another or mistake on its part. Reformation of the mortgage to add an additional party was reversible error.<sup>3</sup>

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<sup>2</sup> Indeed, reformation not having been sought or granted on this basis, the argument need not be addressed. George v. Empire Fire and Marine Ins. Co., 336 S.C. 206, 519 S.E. 2d (Ct. App. 1999).

<sup>3</sup> Petitioner cites to the maxim that "one who seeks equity must do equity." Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 479, 451 S.E. 2d 924 (1994). While this is a long established principle Petitioner misapplies it here. Petitioner by bringing the foreclosure action sought equity. Respondents merely defended the action by challenging Petitioners claim of a superior lien. Thus, contrary to Petitioner's insistence, it was not Respondents that sought equity but rather Petitioner.

**II. THE COURT OF APPEALS CORRECTLY DETERMINED EQUITABLE SUBROGATION WAS NOT AN AVAILABLE REMEDY.**

**A. THE ISSUE OF EQUITABLE WAS ADDRESSED BY THE LOWER COURT AND PROPERLY ADDRESSED BY THE COURT OF APPEALS.**

Petitioner argues that the Court of Appeals should not have addressed the issue of equitable subrogation. This position is contrary from the position Petitioner took before the Court of Appeals. Petitioner did not assert the issue was not property preserved. Petitioner argued the issue in full without exception in both its Brief and Motion for Reconsideration.

Likewise, during the trial of the matter Petitioner elicited and introduced evidence to attempt to support its claim of equitable subrogation, by specifically introducing the testimony of Dugas as to his knowledge of the existence of the DeCarlis Mortgage. At the close of trial Petitioner sought a determination on equitable subrogation. After failing to memorialize the ruling in the initial Order, Petitioner then sought to amend the Order to include it in hindsight. (App. 14). Respondents sought reconsideration. During a telephone conference the Court ruled on the issues. Following the telephone conference an Order was entered. At the instruction of the Court, the Order included the notation that all issues had been addressed by Defendants and ruled on by the court. The issues relating to equitable subrogation were properly preserved and addressed by the Court of Appeals.

**B. THE REQUIRED ELEMENTS NECESSARY TO ESTABLISH EQUITABLE SUBROGATION WERE NOT ESTABLISHED AND DID NOT EXIST.**

The requirements a mortgagee must meet to qualify for equitable subrogation are:

(1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; (4) no injustice will be done to the other party by the allowance of equitable subrogation; and (5) the party asserting the doctrine did not have actual notice of the prior mortgage. Matrix Fin. Serv. Corp. v. Frazier, 394 S.C. 134, 714 S.E.2d 532 (2011), citing, Dedes v. Strickland, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992). The Court of Appeals correctly determined the evidence submitted did not support the theory of equitable subrogation.

When determining whether equitable subrogation is appropriate a court should determine if the asserting party had actual or constructive notice of a prior recorded mortgage. See Pee Dee State Bank v. Prosser, 295 S.C. 229, 367 S.E.2d 708 (Ct. App. 1988). "As a general rule, a principal is charged with the knowledge an agent acquired before the relationship only when the knowledge can reasonably be said to have been in the mind of the agent while acting for the principal or where he acquired it so recently as to raise the presumption he still retained it in his mind." Id. citing, Aiken Petroleum Co. v. National Petroleum Underwriters, 207 S.C. 236, 36 S.E.2d 380 (1945); McSweeney v. Prudential Ins. Co. of America, 128 F.2d 660 (4th Cir.1942), cert. den. McSweeney v. Prudential Ins. Co. of America, 317 U.S. 658, 63 S. Ct. 57, 87 L. Ed. 529 (1942).

The record is clear. Petitioner had notice of the DeCarlis Mortgage. The title search conducted by Dugas revealed the DeCarlis Mortgage. (App. 117, 118, 119). Dugas acknowledged that in order for Petitioner to obtain a superior lien interest, the lien of DeCarlis had to be released. The requirement that the party asserting equitable subrogation must have no knowledge of the prior lien was not and could not be met. The

Court of Appeals reversed the Master in Equity for erring for disregarding the clear evidence in the case.

**1. The knowledge of the party asserting equitable subrogation is the relevant inquiry.**

Petitioner argues that the Court of Appeals did not impute the knowledge of Dugas in whole to all parties. Petitioner suggests that had the Court of Appeals imputed the knowledge to all it should have ruled for Independence on equitable subrogation. This ignores the requirements of equitable subrogation and shifts the burden of the asserting party.

A party asserting equitable subrogation has the burden of establishing it lack knowledge of the prior mortgage. Matrix Fin. Serv. Corp. v. Frazier, 394 S.C. 134, 714 S.E.2d 532 (2011). The focus was and is on what the party asserting the theory of equitable subrogation knew; the focus was on what Independence knew. Petitioner's attempted shift of the inquiry is just a red herring. Independence knew of the existence of the DeCarlis mortgage thereby it could not establish all the necessary elements of equitable subrogation as correctly determined by the Court of Appeals.

**2. The case of Crystal Ice is inapplicable.**

Repeatedly Petitioner brings new issues before this Court that were not addressed below. Arguing that Dugas' knowledge should have been imputed to DeCarlis, which in turn should have impacted the Court of Appeals decision, Petitioner relies on the case of Crystal Ice Co. of Columbia v. First Colonial Corp., 273 S.C. 306, 257 S.E. 2d 496 (1979). Reliance on Crystal Ice is misplaced.

Crystal Ice does not deal with either theory of reformation or equitable subrogation, as this case does. Different from here, Crystal Ice involved a purchase

money mortgage. Different from here, Crystal Ice involved the contemporaneous recording of several instruments. Different from the present circumstances, no fraud was asserted much less having been perpetrated. Id. at 498. In Crystal Ice the Court returned a purchase money mortgage to priority over a mortgage recorded ahead one minute in time on the grounds: “It is patently obvious that Shealy's purchase money interest necessarily would be prior to the mortgage assigned to respondent; First Colonial had no interest to mortgage until it acquired the Shealy property, and the deed and the purchase money interest were executed simultaneously.” Id. at. 498. This case involves the priority of a mortgage recorded years ahead of the mortgage seeking priority, which knowledge of the mortgagee.

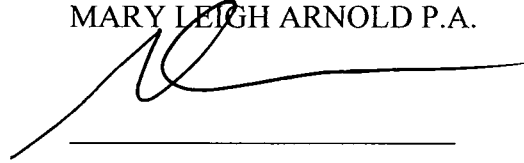
The Court of Appeals correctly reviewed the facts before it and correctly applied the law. Based on the facts Independence failed to meet its burden and the lower court should not have granted the relief requested. To do as Independence asks and reverse the Court of Appeals would alter well established principles and create inconsistent results.

### **CONCLUSION**

For the foregoing reasons the Court of Appeals correctly reviewed the matter and reversed the lower court's decision that a mortgage recorded years in advance over a subsequently recorded lien was not entitled to priority. The Court of Appeals decision should be affirmed and the DeCarlis Mortgage should have priority.

Respectfully Submitted,

MARY LEIGH ARNOLD P.A.



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Dated: August 18, 2014

Mary Leigh Arnold  
SC Bar No. 000419  
749 Johnnie Dodds Blvd. Suite B  
Mount Pleasant, SC 29464  
Email: [sammie@maryarnoldlaw.com](mailto:sammie@maryarnoldlaw.com)  
*Attorney for Respondents*

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Charles B. Simmons, Master in Equity

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Case No. 2010-CP-23-3860  
Appellate Case No. 2013-00915

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Independence National Bank ..... Petitioner,

v.

Buncombe Professional Park, LLC, and David DeCarlis,  
a/k/a David D. DeCarlis ..... Respondents.

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PROOF OF SERVICE

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I, the undersigned, certify that I have served all counsel in this action with a copy of the Brief of Respondents by depositing a copy of it in the United States Mail, postage prepaid, on August 18, 2014, to the following address:

C. Mitchell Brown, Esq.  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
P.O. Box 11070  
Columbia, S.C. 29201  
Attorneys for Petitioner



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MARY LEIGH ARNOLD, P.A.  
Mary Leigh Arnold  
749 Johnnie Dodds Blvd., Suite B  
Mt. Pleasant, South Carolina 29465

August 18, 2014