

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2009-CP-07-04301

Case No. 2009-CP-07-05088

**RECEIVED**  
JUL 09 2012  
**SC Court of Appeals**

Daniel L. Junk and Christine H. Junk, Appellants,

v.

Mortgage Electronic Registration Systems, Inc., and John Does 1-5,000, Respondents.

CitiMortgage, Inc., Respondent,

v.

Daniel Junk a/k/a Daniel L. Junk and Christine H. Junk and Oldfield Community Association, Defendants,

Of Whom Daniel L. Junk and Christine H. Junk are, Appellants,

Daniel L. Junk and Christine H. Junk, Counterclaim Appellants,

v.

CitiMortgage, Inc. Counterclaim Respondent.

Daniel L. Junk and Christine H. Junk, Third-party Appellants,

v.

Riley Pope & Laney, LLC , Heidi Carey, Esq., Roy Laney, Esq., T. Lowndes Pope, Esq.,

Bayview Loan Servicing, LLC, MERSCORP, Inc.,  
Mortgage Electronic Registration Systems, Inc.,  
Citi Master Servicing, Citigroup Global Markets  
Realty Corp., Citigroup Mortgage Loan Trust, Inc.,  
John Does 1-5,000, Jennifer Oakes, Robert G.  
Hall, Security Connections, Inc., Krystal Hall,  
Danielle Sterling, ABC Appraisal Group, Inc.,  
Mark A. Ruplinger, Linda Heller, Harry Jones,  
Colonial Coast Title Agency, Inc., Lawyers Title  
Insurance Corporation, Corelogic, Inc. and American  
Home Mortgage Holdings, Inc.

Third-Party Respondents.

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REPLY TO PETITION FOR REHEARING

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Pursuant to Rule 240(f), of the South Carolina Appellate Court Rules, Appellants submit this Reply to the Petition for Rehearing of this Court's Order dated June 7, 2011 denying Appellants' Motion to Dismiss or Stay in the Alternative the Foreclosure Action Pending Appeal of the Quiet Title Action ("Motion"). Appellants' submit the Petition for Rehearing in all sincerity under Rule 221(c), of the South Carolina Appellate Court Rules, in the belief that this Court's denial of Appellants' Motion in effect decides Appellants' pending appeals of their quiet title actions.<sup>1</sup>

Appellants' submit with all due respect and sincerity that their Petition for Rehearing is brought in good faith. In effect, the denial decides the merits of the quiet title actions by finding MERS had a valid lien on Appellants' property and that MERS permissibly transferred that valid interest during the pendency of the quiet title action to Respondents. In effect, the June 7 Order recognizes that assignment from MERS as a valid transfer allowing Respondents to maintain the subsequent foreclosure action wherein Respondents claim standing and, irrespective the equitable doctrine of lis pendens, the Court finds subject

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<sup>1</sup> Supreme Court Tracking No. 2012-205650; S.C. Court of Appeals Tracking No. 2012-210910.

matter jurisdiction in the foreclosure action based upon that assignment during the pendency of the quiet title action.

Appellants respectfully submit that this Court overlooked the effect of the June 7 Order on the quiet title appeals. The denial of the Motion decides the validity of the MERS lien rendering the quiet title appeals moot. The June 7 Order on Appellants' Motion was a one word order – “Denied.” Appellants' in all sincerity believe the Court overlooked the issues raised in the Motion. With all due respect, Appellants' Petition for Rehearing is not a frivolous motion and their intent is to raise the fatal fundamental and jurisdictional flaws in the filing of the foreclosure action to the Court's attention for adjudication – not delay.

The law argued in the Petition for Rehearing is the same law as that argued in the Motion – the law did not change on these issues after the Motion was filed. In effect, with this denial, the Court is: i) adjudicating the merits of the quiet title actions in recognizing the MERS lien as valid; and, ii) conferring standing and subject matter jurisdiction for the foreclosure action based on that MERS assignment of its lien during the pendency of the quiet title action. In effect, the June 7 Order deems Appellants' arguments in the quiet title actions both below and in this Court, as to the validity of the MERS lien on appellants' property and whether any interest was in fact transferred by said assignments, inapposite.

It's as if Appellants' never filed their original quiet title action in the first place; yet, the validity of the MERS original lien is the nexus for all the issues before this Court and the lower court in both quiet title actions and the foreclosure action. Appellants' quiet title action is focused solely on that issue. Standing and subject matter jurisdiction in the subsequent foreclosure action is conditioned upon the validity of the MERS lien prior to the assignments made during the quiet title action. Appellants' submit that the effect of the June

7 Order decided that issue against Appellants in its denial of their Motion.

The effect of the denial is to hold that MERS had a valid and perfected interest in Appellants' title to their property as a matter of law at the time the quiet title action was filed; therefore, adjudicating the quiet title actions on the merits and in effect deciding Appellants' appeal of both quiet title actions. Appellants submit this Petition for Rehearing under the sincere belief that this Court overlooked those issues in the June 7 Order of denial and that those issues in effect decide the appeals of the quiet title actions. Appellants Petition for Rehearing should be granted therefor.

#### ARGUMENT

**I. APPELLANTS FILED THE ORIGINAL QUIET TITLE ACTION CHALLENGING THE VALIDITY OF THE MERS LIEN ON THEIR PROPERTY AND MERS ASSIGNED ITS INTEREST, IF ANY, AFTER SERVICE OF PROCESS IN THE QUIET TITLE ACTION.**

“The mortgagor of land is the owner in fee and has title to the land so mortgaged, but the mortgagee has a lien upon the land to secure his debt.” *Epstein v. Coastal Timber Co., Inc.*, 393 S.C. 276, 711 S.E.2d 912 (S.C. 2011) *citing Simms v. Kearse*, 42 S.C. 43, 20 S.E. 19 (1894); *see also* S.C. Code Ann. § 29-3-10 (2007) (stating “the mortgagor shall be deemed the owner of the land and the mortgagee as owner of the money lent or due”). “The doctrine of lis pendens applies to all suits or actions which directly affect real property.” 54 C.J.S. *Lis Pendens* § 10 (2012). “[A]ctions for quiet title and will contests are within the doctrine of lis pendens.” *Id.* Under the doctrine of lis pendens “... if the defendant aliens after the pendency of the writ, the judgment in the real action shall overreach such alienation.” *Watlington v. Howley*, 1 Des. 167, 1787 WL 78, FN1a (S.C. Ch. 1787) *citing Sorrell vs. Carpenter*, 2 P. Wms. p. 482, 483 (emphasis added). “The object is to prevent that interminable round of litigation which must ensue if property might be shuffled from hand to hand to elude the process of the law....”

Therefore where a person purchases an estate during the pendency of an action to try the title, or where a bill is filed to obtain an estate which is charged with the payment of debts, the estate will be subject to those prior claims.” *Edmonds v. Crenshaw*, 1 McCord Eq. 252, 1826 WL 747 (S.C. App. 1826) citing *Walker v. Smallwood*, Amb. 676, *Sorrell v. Carpenter*, 2 P. Wms. 482 (emphasis added).

Appellants filed a quiet title action against the only recorded interests on their property – American Home Mortgage (“AHM”), Mortgage Electronic Registration Systems, Inc. (“MERS”) and John Does 1-5,000 (“original quiet title action”) on September 11, 2009. The central issue of Appellants’ original quiet title action is to determine the validity of the MERS lien as nominee mortgagee for its principal, AHM, which went bankrupt in August 6, 2007 and was ordered liquidated effective February 18, 2009.

In its answer to the original quiet title action, MERS pled it assigned its interest(s) in Appellants property and debt, if any, to Bayview. The purported MERS assignment to Bayview occurred during the pendency of the quiet title action – eight (8) days after effecting service of process of the original quiet title action amended summons and amended complaint on MERS.

The assignment from MERS to Bayview is stated as the basis of Bayview’s acquisition of its interest in Appellants’ property. Moreover, Bayview claims the MERS assignment as a way of establishing standing to maintain the subsequently-filed foreclosure action.

Bayview’s foreclosure complaint was verified on personal knowledge by Bayview counsel Ms. Heidi Carey, Esq. and her partners at Riley Pope & Laney. Almost five months after Bayview initiated the mortgage foreclosure action, Bayview purportedly assigned the mortgage and note to CitiMortgage and recorded that assignment on March 19, 2010. The Circuit Court thereafter in the April 11, 2011 Order substituted CitiMortgage as plaintiff in the

mortgage foreclosure action based on the purported assignment of the note and alleged mortgage to Bayview to CitiMortgage during the pendency of the quiet title action.

Under the doctrine of *lis pendens*, Bayview's and CitiMortgage's interest in Appellants' property and standing to foreclose upon that interest is subject to the outcome of the original quiet title action. Notwithstanding the *lis pendens* equitable doctrine, the June 7 Order denying Appellants' Motion in effect decided the central issue of Appellants' appeal of the original quiet title action – the validity of the original MERS lien on Appellants' property and the Petition for Rehearing should be granted therefor.

**II. THE COURT IS EXERCISING JURISDICTION IN A MATTER WHERE RESPONDENTS HAVE NO STANDING, IN EFFECT, DECIDING THE PENDING APPEAL(S) OF THE QUIET TITLE ACTIONS AND THE FORECLOSURE ACTION SHOULD BE DISMISSED OR STAYED *EX MERO MOTU* AS A MATTER OF LAW BASED ON THE PLEADINGS.**

Under the doctrine of *lis pendens*, Bayview's and CitiMortgage's interest in Appellants' property and standing to foreclose upon that interest is subject to the outcome of the original quiet title action. *Edmonds v. Crenshaw*, 1826 WL 747 (S.C. App. 1826), *Id.* Until the appeal of the quiet title actions is decided, neither Bayview nor CitiMortgage have standing to maintain the foreclosure action.

Moreover, the Foreclosure Complaint attached and incorporated the MERS assignment of Appellants' property and debt to Bayview during the pendency of the original quiet title action and a copy of the alleged refinance promissory note ("Refi Note") purportedly indorsed to CitiMortgage – not Bayview – as exhibits to its complaint. The terms of the attached assignment and Refi Note control the facts of the Bayview Foreclosure Complaint. The parol evidence rule "is one of substantive law, 'the terms of the writing are controlling, even though evidence within its inhibition is admitted without objection or . . . is admitted over appropriate objection. *Muckelvaney v. Liberty Life Ins. Co.* 261 S.C. 63, 198 S.E.2d 278 (S.C. 1973) citing *Adams v.*

*Marchbanks*, 253 S.C. 280, 282, 170 S.Ed.2d 214, 215 (S.C. 1969), and authorities therein cited.

‘The terms of the application and policy, on which plaintiff expressly pitches her cause of action, control the repugnant conclusionary allegations of the complaint as to the effective date of coverage, even for the purposes of the demurrer.’” *Id.* citing *Lindley v. Yeatman*, 242 N.C. 145, 87 S.E.2d 5, 10 (N.C. 1955); 61 Am. Jur. 2d Pleading, Sec. 255 (1972).

Under S.C. Code §§ 36-3-205, 36-3-301:

**SECTION 36-3-205. Special indorsement; blank indorsement; anomalous indorsement.**

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a "special indorsement." **When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person.** The principles stated in Section 36-3-110 apply to special indorsements.

**SECTION 36-3-301. Person entitled to enforce 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.

Under S.C. Code §29-3-630:

**SECTION 29-3-630. Debt secured must be established before sale by mortgagee.**

No sale under or by virtue of any mortgage or other instrument in writing intended as security for a debt, conferring a power upon the mortgagee or creditor to sell the mortgaged or pledged property while such power remains of force or has not been revoked by the death of the person executing such mortgage or instrument, shall be valid to pass the title of the land mortgaged **unless the debt for which the security is given shall be first established by the judgment of some court of competent jurisdiction** or unless the amount of the debt be consented to in writing by the debtor subsequently to the maturity of the debt, such consent in writing to be recorded in the office of the register of deeds or clerk of the court where the mortgage or other instrument in writing given to

secure such debt is or ought to be recorded. But if the mortgagor be dead it shall not be necessary in any foreclosure proceeding first to establish the debt by the judgment of some court of competent jurisdiction in order to obtain a decree of foreclosure and sale (emphasis added).

The Bayview Foreclosure Complaint, on its face with its incorporated exhibits, does not demonstrate as a matter of law that Bayview was the owner and holder of the Refi Note as pled nor is there a scintilla of evidence in the pleading that Bayview has authority to enforce the Refi Note. Bayview claims in its pleading that it acquired the purported mortgage through the MERS assignment that occurred during the pendency of the original quiet title action, and the Refi Note is made payable to AHM with an alleged special indorsement from AHM to CitiMortgage – not Bayview. Based on the pleadings, Bayview does not have standing to maintain the foreclosure action, the court lacks subject matter jurisdiction therefor and the June 7 Order, in effect, determined the merits of the quiet title action by recognizing Bayview and CitiMortgage's standing based the assignment of the challenged MERS lien that occurred during the pendency of the original quiet title action.

The Foreclosure Complaint on its face warrants dismissal as a matter of law; however, Bayview supplemented its pleadings with an affidavit further confirming that Bayview never had standing to bring the foreclosure action. Bayview filed the Supplemental Affidavit of Jennifer Oakes on December 6, 2010 attesting under oath that Bayview never has had an interest in the Refi Note. "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same litigation. The doctrine's function is to protect the integrity of the judicial process or the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. The doctrine generally applies only to inconsistent statements of fact. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (S.C. 1997) (adopting the doctrine of judicial estoppel as it relates to matters of fact in South

Carolina); *Quinn v. The Sharon Corporation*, 343 S.C. 411, 416, 540 S.E.2d 474, 476 (Ct. App. 2000) (Anderson, J., concurring) “A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. Therefore, a litigant cannot ‘blow both hot and cold.’ Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements, or contentions made under oath, is prohibited from adopting an inconsistent posture in subsequent proceedings.” (citations omitted).

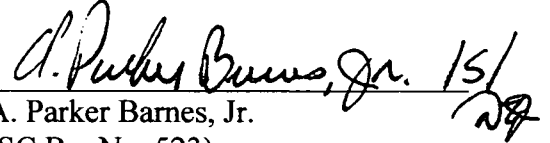
It is clear from the pleadings that Bayview received its interest, if any, during the original quiet title action. The copy of the Refi Note attached and incorporated into the complaint contains a special indorsement to CitiMortgage, not Bayview. On the face of the pleadings, Bayview lacked any interest in the mortgage and had no authority to enforce the alleged debt at the time it filed the Foreclosure Complaint. Appellants respectfully submit that this Court overlooked these issues in its June 7 Order and in effect decided the outcome of the quiet title action appeals.

#### CONCLUSION

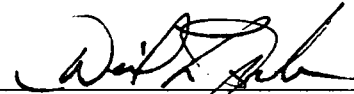
Appellants submit this Petition for Rehearing in the sincere belief that the June 7 Order decided the merits of their quiet title action appeals. The Petition for Rehearing was filed in good faith with the firm belief that this Court’s the June 7 Order overlooked the issues raised in this Petition and Reply Memorandum and respectfully request the Petition be granted.

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Respectfully submitted,

 15/27

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Columbus, Ohio  
July 7, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
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Honorable Marvin H. Dukes, III, Master in Equity

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Home Mortgage Holdings, Inc.

Third-party Respondents.


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PROOF OF SERVICE

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I certify that I have served the Appellants' Reply to Petition for Rehearing to counsel listed below by depositing a copy of it in the United States Mail, postage prepaid, on July 7, 2012.

July 7, 2012

  
\_\_\_\_\_  
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DANIEL L. JUNK, J.D.

*Pro Se Appellant*

July 7, 2012

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

Re: CitiMortgage v. Junk and Junk v. CitiMortgage Case No. 2012-210910

Dear Ms. Kitchings,

Enclosed please find an Original and seven (7) copies of Appellants' Reply to the Petition for Rehearing. Additionally, please find an Original and seven (7) copies of Appellants' Return to Respondent CitiMortgage's Motion for Sanctions.

Kindly file the Original of each memoranda and file stamp one copy of each memoranda and return to me in the attached self-addressed stamped envelope. Should you need anything further please contact me at the number below. Thank you in advance.

Sincerely,



Daniel L. Junk,  
*Pro se Appellant*

cc: A. Parker Barnes, Jr., Esq.

**RECEIVED**  
JUL 09 2012

**SC Court of Appeals**