

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

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Appellate Case No. 2014-001285

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**RECEIVED**

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**SC Court of Appeals**

National Security Fire and Casualty Company, Plaintiff

-vs-

Rosemary Jenrette, a/k/a Rosemary Long Jenrette and Horry County State Bank,  
Defendants,

Of whom

Rosemary Jenrette a/k/a Rosemary Long Jenrette is the Appellant

And

Horry County State Bank is the Respondent.

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**INITIAL BRIEF OF RESPONDENT**

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT CORRECTLY FIND THE EXISTENCE OF AN EQUITABLE LIEN IN FAVOR OF THE RESPONDENT MORTGAGEE ON THE INSURANCE PROCEEDS?
- II. DID THE TRIAL COURT CORRECTLY FIND THAT THE APPELLANT MORTGAGOR WAS BOUND BY A COVENANT IN THE MORTGAGE TO INSURE THE SUBJECT PROPERTY AS SECURITY FOR THE MORTGAGE LOAN?
- III. IS THE PRIOR ASSIGNMENT OF INSURANCE PROCEEDS BINDING ON THE APPELLANT MORTGAGOR AFTER THE CANCELLATION OF THE MORTGAGE INCIDENT TO FORECLOSURE?
- IV. DID THE TRIAL COURT CORRECTLY FIND THE EXISTENCE OF AN EQUITABLE LIEN ON THE INSURANCE PROCEEDS BASED UPON THE ADDITIONAL SUSTAINING GROUNDS?

## STATEMENT OF THE CASE

On November 3, 2011, Plaintiff National Security Fire and Casualty Company, hereinafter "Carrier" filed this interpleader action, naming both Appellant and Respondent as Defendants in this action. (Complaint, p.1). Carrier filed this action as a result of Appellant's and Respondent's competing claims to the proceeds from an insurance policy in the amount of One Hundred Five Thousand and 00/100ths Dollars (\$105,000 00) which were placed into an escrow account by the Carrier. (Final Order, February 11, 2014, p. 1). Both Appellant and Respondent timely answered the Carrier's Complaint and cross-claimed against one another for the proceeds of the insurance policy. (Final Order, February 11, 2014, p. 1) Appellant sought a declaratory judgment that Appellant was solely entitled to the proceeds of the insurance proceeds. (Final Order, February 11, 2014). Appellant also cross-claimed against Respondent for tortious interference with contractual relationship, however Appellant abandoned this cause of action at the trial. (Jenrette Answer, p. 2; Trial Transcript, p. 55, line 20- p. 57, line 12) Respondent cross-claimed against Appellant for the proceeds of the insurance policy under an equitable lien theory. (Final Order, February 11, 2014). Both Respondent and Appellant timely filed replies to the cross-claims and the pleadings were joined in this matter. After conducting discovery, Respondent filed a Motion for Summary Judgment on May 16, 2012. (HCSB Motion for Summary Judgment, p. 1). A hearing was held before the Honorable Larry B. Hyman, Jr. on September 18, 2012 whereby Respondent's Motion for Summary Judgment was granted (Order Granting Defendant Respondent's Motion for Summary Judgment, October 4, 2012, p. 1, 5). Appellant filed a Motion to Reconsider, which was heard by the Honorable Larry B. Hyman, Jr. on January 23, 2013. (Order Granting Appellant's Motion to Reconsider, March 5, 2013).

Appellant's Motion to Reconsider was granted by Judge Hyman by Order filed March 5, 2013. (Order Granting Appellant's Motion to Reconsider, March 5, 2013).

On June 3, 2013, Appellant filed a Motion for Summary Judgment. (Jenrette Motion for Summary Judgment, p. 1). A hearing was held before the Honorable Larry B. Hyman, Jr. on July 30, 2013, whereby Appellant's Motion for Summary Judgment was denied (Order Denying Jenrette's Motion for Summary Judgment, August 30, 2013, p. 1). Thereafter, this matter was placed on the non-jury trial roster for October 14, 2013. Due to a scheduling conflict for a material witness, Respondent filed a Motion for Continuance on October 14, 2013. (Notice of Motion and Motion for Continuance, October 14, 2013, p. 1). Subsequently, a non-jury trial was held on December 17, 2013 before the Honorable George C. James, Jr. (Final Order, February 11, 2014, p.1). At the conclusion of the trial, the Trial Court took the matter under advisement and issued its written Order on February 10, 2014 ordering that the funds placed into an escrow account by Carrier be paid to Respondent. (Final Order, February 11, 2014, p. 14). Appellant filed a timely Motion to Reconsider the Trial Court's Order filed February 11, 2014 on March 3, 2014. (Jenrette's Motion to Reconsider, March 3, 2014, p. 1). The Trial Court denied Appellant's Motion to Reconsider without a hearing in an Order filed June 3, 2014, specifically setting forth the reasoning behind the Trial Court's decision. (Order Denying Jenrette's Motion to Reconsider, June 3, 2014, p.1). Appellant served her Notice of Intent to Appeal the Final Order filed February 11, 2014 and the Order Denying Jenrette's Motion to Reconsider filed June 3, 2014 on June 11, 2014. The funds placed into an escrow account with the Horry County Clerk of Court remain in escrow and have not been disbursed.

## STATEMENT OF FACTS

The facts of this case are largely uncontroverted between the parties. Appellant obtained title to the real property which was the subject of the instant action, 104 Country Club Drive, on September 11, 2007 from her mother. (Trial Tr., p. 128, lines 4-9). The property contained approximately one acre and a dwelling which was vacant from the time Appellant obtained title until December 2008, when Michael Brooks Quickel, Appellant's son moved into the house. (Trial Tr., p. 128, lines 16-17; Final Order, February 11, 2014, p. 2, ¶ 1). Appellant obtained a dwelling fire insurance policy insuring the subject property in the amount of One Hundred Thousand and 00/100ths Dollars (\$100,000 00) for the effective of March 9, 2009 to March 9, 2010 from Carrier through Bradham Insurance Agency (Trial Tr., p 10, lines 8-15; p 13, lines 9-20, Final Order, February 11, 2014, p. 2-3, ¶ 1; HCSB Ex 1; HCSB Ex 2; Jenrette Ex. 2)

On April 24, 2009, Appellant's son, Michael Brooks Quickel obtained a loan commitment from Respondent for a loan in the amount of Three Hundred Fifty Thousand and 00/100ths Dollars (\$350,000.00) for his limited liability company Cajun Carolina, LLC which was to be secured by Six (6) unimproved lots and the improved property which is the subject of this action (Trial Tr p. 67, line 23- p. 69, line 2; HCSB Ex. 3; Final Order, February 11, 2014, p. 3, ¶ 3). On April 27, 2009, Appellant executed a Specific Power of Attorney granting Mr. Quickel authority to procure a loan with Respondent in the amount of \$350,000 00 using Five (5) lots owned by Appellant, inclusive of the subject property, as security for the loan. (Trial Tr , p. 29, line 21- p. 30, line 15; p 70, line 25- p. 71, line 23; HCSB Ex. 4; Final Order, February 11, 2014, p. 3, ¶ 4). The Specific Power of Attorney signed by Appellant specifically authorized Mr. Quickel "to execute a note, evidencing said indebtedness and a mortgage on forms acceptable to

the said Lender, to approve a closing statement, disclosure and loan disbursement statement; to execute any and all loan company forms required or necessary to effect the foregoing, to endorse checks, drafts or money orders evidencing said loan, and generally to execute and deliver all forms or documents executed and delivered in connection with the financing thereof by Horry County State Bank.” (HCSB Ex. 4; Final Order, February 11, 2014, p. 3, ¶ 4). The Power of Attorney executed by Appellant did not limit the authority granted to Mr. Quickel in any way. (Trial Tr , p 30, lines 6-15; p 110, lines 4-13; p 111, line 17- p. 112, line 2). On May 1, 2009, Mr. Quickel attended a closing where he executed a loan package in order to obtain the \$350,000.00 loan from Respondent (Trial Tr , p. 79, lines 23-25, Final Order, February 11, 2014, p. 4, ¶ 6). At the loan closing, Mr. Quickel executed a Promissory Note from Cajun Carolina, LLC to Respondent in the amount of \$350,000 00 and several other documents, including Two (2) Mortgages, a Settlement Statement, an Agreement to Provide Insurance and Two (2) Hypothecation Agreements (HCSB Ex 5, HCSB Ex. 6; HCSB Ex. 8; HCSB Ex. 17, HCSB Ex. 18).

Mr. Quickel, executed One (1) Mortgage on his own behalf, encumbering Two (2) lots he owned personally, and the other Mortgage on behalf of Appellant, as her attorney in fact, which encumbered Five (5) total lots owned by Appellant, including the residence which is the subject of this action. (HCSB Ex. 6) The Mortgage germane to this action referred to Appellant as “Borrower” as that term was defined in the Mortgage (HCSB Ex. 6). Section Three of the Mortgage encumbering this property included an Insurance Clause, requiring Appellant to obtain an insurance policy insuring the subject property against casualty for the benefit of the Respondent at Appellant’s expense (HCSB Ex. 6; HCSB Ex. 7, Final Order, February 11, 2014, pp. 4-5, ¶¶7-8; Trial Tr p 39, line 13-p. 40, line 7, HCSB Answer, p 3, ¶ 11) Furthermore,

Section Three of the subject Mortgage assigned the proceeds of any insurance policy to Respondent. (Final Order, February 11, 2014, p. 5, ¶¶ 9-11; HCSB Ex. 6; HCSB Ex. 7; Trial Tr., p. 39, line ) Appellant subsequently renewed the fire insurance policy for the policy period of March 9, 2010 to March 9, 2011 (Trial Tr. p. 16, lines 9-11; Final Order, February 11, 2014, p. 3, ¶ 2; HCSB Exhibit 1, HCSB Exhibit 2; Jenrette Exhibit 6). However, Appellant failed to name Respondent as a loss payee or mortgagee on the insurance policy renewal (Trial Tr., p. 14, lines 6-24; p.132, lines 18-21; HCSB Ex. 1; HCSB Ex. 2, Jenrette Ex. 6; HCSB Answer, p. 3, ¶ 15)

Subsequently, Mr. Quickel and Cajun Carolina, LLC defaulted on the loan and Respondent began a foreclosure proceeding against Mr Quickel, Cajun Carolina, LLC and Appellant. (Final Order, February 11, 2014, p 5, ¶ 12; Trial Tr , p. 19, line 10- p 20, line 12, p 82, lines 5-21). During the pendency of the foreclosure action, a fire occurred on the subject property, resulting in the total loss of the structure (Trial Tr., p. 11, line 23- p. 12, line 10; p. 46, line 13- p. 47, line 6; p. 82, line 22- p 83, line 6; p. 114, lines 7-14; Final Order, February 11, 2014, pp. 5-6, ¶ 13). On January 18, 2011, Respondent contacted Bradham Insurance Agency to make a claim to the proceeds under the fire insurance policy and forwarded information supporting the claim which was forwarded to the Carrier (HCSB Ex. 2, pp. 15-24). Carrier issued a check representing the proceeds of the insurance policy jointly to Appellant and Respondent. (Complaint, p 2, ¶ 10). Appellant refused to endorse the proceeds check as it was made payable to both Appellant and Respondent. (Trial Tr , p. 13, lines 3-4; p 138, line 25- p. 139, line 23). The foreclosure action was concluded, resulting in the sale of the real property at public auction on August 1, 2011 to the Respondent as successful bidder. (Final Order, February 11, 2014, p. 6, ¶ 14; Trial Tr. p. 133, lines 20-23). Incidental to the sale of the property at public auction, Respondent obtained a deficiency judgment against Mr Quickel and Cajun Carolina,

LLC in the amount of One Hundred Seventeen Thousand Five Hundred Forty Six and 89/100ths Dollars (\$117,546.89). (Trial Tr., p. 85, line 13- p. 86, line 1, Final Order, February 11, 2014, p. 6, ¶ 14). Subsequent to the foreclosure sale, the Master in Equity for Horry County executed a Release of Lien relating to the subject property sold to Respondent at public auction as required by S.C. Code Ann. §§29-3-780 and 29-3-790 (2007) (Jenrette Ex 8; Final Order, February 11, 2014, p. 6, ¶ 14; Trial Tr., p. 134 line 10- p.135, line 3). The deficiency resulting from the foreclosure sale remains unsatisfied.

#### STANDARD OF REVIEW

“An action to establish an equitable lien is an action in equity” Fibkins v. Fibkins, 303 S.C. 112, 399 S.E.2d 158 (Ct App. 1990) *citing to* Swearingen v. Hartford Fire Ins. Co., 56 S.C. 355, 34 S.E. 449 (1899). “In an action in equity, tried by the judge alone, without a reference, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence.” Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct App 2010) *citing to* Townes Assocs., Ltd. V. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). “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. Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings.” Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001) The appellate court “will affirm the findings of the trial court in an equity case unless the appellant satisfies this court that the preponderance of the evidence is against the findings of the trial court.” Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct. App 2011) *citing to* Lewis v. Lewis, 392 S.C. 381, 709 S.E.2d 650 (2011).

“Additionally, ‘a legal question in an equity case receives review as in law.’” North Am. Rescue Prod. v. Richardson, 396 S.C. 124, 720 S.E.2d 53 (Ct App 2011) *citing to* Sloan v. Greenville Cnty., 356 S.C. 531, 590 S E 2d 338 (Ct. App. 2003). “Because questions of law may be decided with no particular deference to the circuit court, this court may correct errors of law in both legal and equitable actions.” North Am Rescue Prod. v Richardson, 396 S.C. 124, 720 S.E.2d 53 (Ct. App. 2011) *citing to* FOn, L L.C v. Town of Mt Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

## ARGUMENT

### I. THE TRIAL COURT CORRECTLY FOUND THE EXISTENCE OF AN EQUITABLE LIEN IN FAVOR OF THE RESPONDENT MORTGAGEE ON THE INSURANCE PROCEEDS

Appellant contends that the Trial Court erred in finding an equitable lien in favor of Respondent to the proceeds of the insurance policy insuring the improved real property which is the subject of this action against fire loss. This contention, simply stated, is untenable.

“While a policy of insurance is purely a personal contract between the insurer and the assured, and hence a mortgagee of the premises insured, merely as such, has no interest, whether in law or in equity, in a policy of insurance taken out by the mortgagor in his own name, and for his own benefit, yet if the mortgagor is bound, either by covenant in the mortgage or otherwise, - for example, by a valid verbal agreement, -to keep the property insured, as a further security for the payment of the mortgage debt, then the mortgagee is entitled to an equitable lien upon the money due on the policy of insurance, even though taken out in the name of the mortgagor.” Swearingen v. Hartford Ins. Co., 52 S.C. 309, 29 S.E. 722 (1898). “If the mortgagor is bound, by covenant or otherwise, to insure the mortgaged premises for the better security of the

mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property destroyed.” Swearingen 52 S.C. 309, 29 S.E. 722 (1898) *citing to* Wheeler v. Factors & T Ins. Co., 101 U.S. 439, 442, 25 L.Ed. 1055 (1880). “This equitable lien arises solely from the unperformed contract to protect, the theory being that since equity regards as done that which ought to have been done, if the mortgagor, having so covenanted, fails to make the insurance payable to the mortgagee, or to assign the same, the fund arising therefrom is within the operation of the maxim.” Blackwell v. State Farm Mutual, 237 S.C. 649, 118 S.E.2d 701 (1961) *citing to* Farmers’ & Merchants’ National Bank of Lake City v. Moore, 135 S.C. 391, 133 S.E. 913 (1926), 47 A.L.R. 1001; Annotation 92 A.L.R. 559, 561

It is uncontroverted that Appellant executed a Specific Power of Attorney granting Mr. Quickel authority to procure a loan with Respondent in the amount of \$350,000.00 using Five (5) lots owned by Appellant, inclusive of the subject property, as security for the loan. (Trial Tr , p. 29, line 21- p 30, line 15; p. 70, line 25- p 71, line 23; HCSB Ex 4, Final Order, February 11, 2014, p. 3, ¶ 4) In particular, the Specific Power of Attorney executed by Appellant contained the following language:

**I, Rosemary Long Jénrette, a/k/a, Rosemary Long, have made, constituted and appointed, and do by these presents make, constitute and appoint Michael Brooks Quickel my true and lawful attorney pertaining to the following described property ... 1600 Country Club Drive/ TMS 123-00-02-069... to procure a loan with Horry County State Bank in the amount of \$350,000.00; to execute a note evidencing said indebtedness and a mortgage on forms acceptable to the said Lender; to approve a closing statement, disclosure and loan disbursement statement; to execute any and all loan company forms required or necessary to effect the foregoing; to endorse checks, drafts or money orders evidencing said loan; and generally to execute and deliver all forms or documents executed and delivered in connection with the financing thereof by Horry County State Bank. Giving and granting to my said attorney full power and authority to do and to perform all and every deed, act, matter and thing, whatsoever in and about the**

**foregoing as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present, the above specifically enumerated powers being in aid and exemplification of the full, complete and general powers hereinabove granted, and not in limitation, definition thereof; and hereby ratify all that my said attorney shall lawfully do or cause to be done by virtue of these presents... I hereby declare that any act or thing done hereunder by said attorney shall be binding on me, my heirs, legal and personal representatives and assigns ...**

(HCSB Ex 4; Final Order, February 11, 2014, p. 3, ¶ 4, Order Denying Jenrette's Motion to Reconsider, June 3, 2014, p. 4, ¶ 2). It was likewise conceded by Appellant that Mr. Quickel had unlimited authority relating to the real property covered by the Specific Power of Attorney. (Trial Tr., p. 110, lines 4-13; p. 111, line 17- p. 112, line 2). Furthermore, Appellant has never suggested Mr Quickel lacked authority to execute the Mortgage at issue in this action on behalf of Appellant, or to pledge the property which is the subject of this action as security for the loan to Mr. Quickel and his company, Cajun Carolina, LLC.

The Mortgage executed by Mr. Quickel on behalf of Appellant referred to Appellant as "Borrower"; although it is uncontested that Appellant was not named as the debtor on the Promissory Note, which was secured by the subject Mortgage. (Final Order, February 11, 2014, p. 4, ¶ 6; Trial Tr., p 136, line 6-11). The importance of the term "Borrower" as used in the Mortgage, is only to ensure that the individual named in the Mortgage, in this instance, Appellant, is specifically identified. The Mortgage could have used any number of terms to designate Appellant as the individual granting the Mortgage in favor of Respondent; it is of no real import that the document used the term "Borrower" and has no impact on the other terms, conditions, and obligations contained in the Mortgage document itself In any instance, Appellant, by and through Mr. Quickel, pursuant to the Specific Power of Attorney, accepted the terms and conditions of the Mortgage and executed the document; explicitly agreeing to be

bound by its terms and conditions. The Mortgage executed on behalf of Appellant pursuant to the Specific Power of Attorney states in pertinent part

**3. Insurance.** (A) *Borrower shall at its sole expense obtain for, deliver to, and maintain for the benefit of Lender, during the life of the Mortgage, insurance policies in such amounts as Lender may require, in no event less than the full insurable value, insuring the Property against fire, extended coverage and such other insurable hazards, casualties and contingencies as Lender may require including flood damage, and shall pay promptly, when due, any premiums on such insurance policies and on any renewals thereof. The form of such policies, the companies issuing them, and the coverage provided shall be acceptable to Lender and shall contain a non-contributory mortgage endorsement making losses payable to Lender. At least thirty (30) days prior to the expiration date of all such policies, renewals thereof satisfactory to Lender shall be delivered to Lender. Borrower shall deliver to Lender receipts evidencing the payment of all premiums on such insurance policies and renewals. In the event of loss, Borrower will give written notice to Lender, and Lender may make proof of loss if not made promptly by Borrower. In the event of the foreclosure of this Mortgage or any other transfer of title to the Property in extinguishment of the indebtedness and other sums secured hereby, all right, title, and interest of Borrower in and to all insurance policies and renewals thereof then in force shall pass to the grantee. Upon the failure of Borrower to obtain and maintain insurance satisfactory to Lender, Lender may at its own discretion procure and substitute for any and all of the insurance so held as aforesaid, such other policies of insurance, in such amounts as Lender, acting in its sole discretion, may determine; all without prejudice to its right to foreclosure hereunder, should Borrower fail or refuse to keep said premises so insured.* (B) *Borrower hereby assigns to Lender all proceeds from any insurance policies, and Lender is hereby authorized and empowered in its reasonable discretion, to adjust or compromise any loss under any insurance policies on the Property, and to collect and receive the proceeds from any such policy or policies. Each insurance company is hereby authorized and directed to make payment for all such losses directly to Lender alone, and not to Borrower and Lender jointly. After deducting such insurance proceeds any expenses incurred by Lender in the collection or handling of such funds, Lender acting in its sole discretion, may; apply the net proceeds (I) to the payment of any sum secured by this Mortgage in such order as Lender may determine or (II) to the replacement, repair or restoration of the portion of the Property damaged or destroyed in a manner determined by Lender; or may release said net proceeds to the Borrower upon such conditions as Lender shall determine; or may apply said net proceeds for any combination of the foregoing; all without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place. If Lender elects to restore the improvements, any balance of such monies after restoration shall either be applied toward the reduction of indebtedness and any other sums secured hereby or shall be paid to Borrower. Lender shall not be responsible for any failure to collect any insurance proceeds*

**due under the terms or any policy regardless of the cause of such failure... 17. Miscellaneous... (I) *If the Borrower is not obligated on the debt which this Mortgage secures, then the Borrower acknowledges that Note was made in consideration for this transaction and the owner of the Property agrees to be bound by all the terms and conditions of the Note and Mortgage.***

(HCSB Ex. 6; HCSB Ex. 7) (Emphasis Added): It is clear from the terms contained in the Mortgage, Appellant was obligated to obtain and maintain insurance coverage on the improved real property for the benefit of Respondent pursuant to paragraph 3 (A) of the Mortgage. It is clear from the language used that it was explicitly intended that Appellant, as the individual obligated under the terms and conditions of the Mortgage, was to obtain insurance coverage which would act as further security for the indebtedness evidenced by the use of the phrase “for the benefit of Lender”. Furthermore, the intention is shown by the phrase “[I]n the event of the foreclosure of this Mortgage or any other transfer of title to the Property in extinguishment of the indebtedness and other sums secured hereby, all right, title, and interest of Borrower in and to all insurance policies and renewals thereof then in force shall pass to the grantee.” Had the requirement that Appellant provide insurance not been intended to act as additional or further security, this phrase would not have been included in the Mortgage.

Not only was Appellant bound by the terms of the Mortgage to obtain and maintain insurance coverage for the benefit of Respondent, pursuant to Paragraph 3 (A) of the Mortgage, but Appellant assigned her interest to any insurance proceeds to Respondent through Paragraph 3 (B) of the Mortgage. It is obvious from the plain language of Paragraph 3 of the Mortgage that not only did Appellant, through her attorney in fact, agree to provide insurance coverage for the benefit of Respondent; she also assigned any rights she had to the proceeds of any insurance policy to Respondent as well

Appellant asserts that in order for an equitable lien to arise, Three (3) elements must be satisfied: (1) a debt between Appellant and Respondent, (2) specific property to which the debt attached; and (3) an express or implied intent that the property serve as security for the debt. (Appellant's Initial Brief, p. 13). Appellant further contends that Respondent has failed to satisfy these elements. This is not the case

As early as 1880, the United States Supreme Court opined "it is settled by many decisions in this country that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed." Wheeler 101 U.S. 439 at 442 *citing to* Thomas's Adm'rs v. Vankapff's Ex'rs, 6 Gill & J. (Md.) 372. This rule was adopted in South Carolina by at least 1898, where the South Carolina Supreme Court announced the rule in Swearingen v. Hartford Ins Co., 52 S.C. 309, 29 S.E.722 (1898). The appellate courts of this State have continued to affirm this rule. *See* Farmers' & Merchants' Nat. Bank of Lake City v. Moore, 135 S.C. 391, 133 S.E.913 (1926), Blackwell v. State Farm Mutual, 237 S.C. 649, 118 S.E.2d 701 (1961); Freshwater v. Colonial Production Credit Association, 286 S.C. 387, 334 S.E.2d 142 (1985); Lewis v. Aynor Farm Center, 290 S.C. 167, 348 S.E.2d 537 (Ct. App. 1986); Jones v. Equicredit Corporation, 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001) Furthermore, this rule is recognized in a majority of jurisdictions in this country. *See* 92 A.L.R. 559 (1934).

In the instant case, it is uncontroverted that the Mortgage required Appellant to insure the property against fire loss for the benefit of Respondent. It is likewise uncontroverted that Appellant failed to obtain the required insurance for the benefit of Respondent, even though she was aware that the property had been pledged to Respondent as collateral for the loan extended

to her son. There is no question that after the foreclosure action was concluded, a deficiency remained and the debt is unsatisfied.

Respondent has sufficiently satisfied each element of an equitable lien and the Trial Court correctly ruled in favor of Respondent. There is no question that there was a debt to Respondent, the payment of which was secured by the Mortgage. Paragraph 17 of the Mortgage states in pertinent part: “[i]f the Borrower is not obligated on the debt which this Mortgage secures, then the Borrower acknowledges that Note was made in consideration for this transaction and *the owner of the Property agrees to be bound by all the terms and conditions of the Note and Mortgage.*” (Emphasis added). Thus, Appellant was obligated and bound by the Promissory Note, as well as the Mortgage, even though Appellant was not the debtor named in the Promissory Note.

Next, the language contained in Paragraph 3 of the Mortgage indicates that the insurance proceeds were additional security for the debt, and to which the debt attaches. Specifically, the Mortgage states: “in the event of the foreclosure of this Mortgage or any other transfer of title to the Property in extinguishment of the indebtedness and other sums secured hereby, all right, title, and interest of Borrower in and to all insurance policies and renewals thereof then in force shall pass to the grantee.” This clause suggests that the insurance proceeds were specifically meant to be additional security for the debt. Thus, the Trial Court correctly found the existence of an equitable lien upon the insurance proceeds at issue (Final Order, February 11, 2014, pp. 12-13, ¶ 12).

Appellant relies heavily upon the case Steinmeyer v. Steinmeyer, 64 S.C. 413, 42 S.E. 184 (1902) in support of her argument that she is entitled to the proceeds of the insurance policy. However, Steinmeyer is factually distinguishable from the instant case. In the Steinmeyer case,

Eliza Steinmeyer, in 1894, voluntarily transferred title to property to Carrie Steinmeyer. In 1897, creditors of Eliza Steinmeyer brought an action against Eliza to set aside several voluntary conveyances, including the conveyance to Carrie, as fraudulent. The trial court ordered that these conveyances be set aside. Appeal was taken by all parties and the trial court's decision was affirmed by the South Carolina Supreme Court. On May 8, 1899, six days after the remittitur was filed in Charleston County, Carrie Steinmeyer obtained an insurance policy in her name insuring the subject property. On May 24, 1899, a fire occurred which damaged the real property, although did not destroy the property, entirely. After the fire, the subject property was sold at public auction with the proceeds being applied to the judgments against Eliza Steinmeyer, however, the proceeds from the sale were insufficient to satisfy the judgments against Eliza Steinmeyer. The creditors of Eliza Steinmeyer subsequently brought suit against Carrie Steinmeyer and Germania Fire Insurance Company seeking to obtain the proceeds of the insurance policy to apply toward the judgments obtained against Eliza Steinmeyer. Germania argued that the policy of insurance was void based upon the assertion that Carrie Steinmeyer's ownership of the property was not unconditional. The South Carolina Supreme Court determined that the policy was valid and enforceable as her interest in the property with respect to the insurance company was unconditional. Essentially, the Steinmeyer Court opined that her title was good as to the entire world, except as to the creditors' right to have the property made subject to the judgment against the grantor, if necessary.

The Court then discussed whether Carrie Steinmeyer or Eliza Steinmeyer's creditors were entitled to the proceeds of the insurance policy. The South Carolina Supreme Court held that Carrie Steinmeyer was entitled to the proceeds. In doing so, the Steinmeyer Court reasoned that an insurance policy is personal to the insured and does not run with the buildings to be insured.

and that, while there was no doubt that Eliza Steinmeyer's creditors' could look to the property itself to apply toward the judgments obtained against her; they could not reach the insurance proceeds.

The facts of the Steinmeyer case are far from analogous to the instant case. The most important distinction between Steinmeyer and this case is the fact that in this case, Appellant specifically agreed in the Mortgage to obtain and maintain insurance for the benefit of Respondent, creating contractual privity between Appellant and Respondent. In Steinmeyer, no such agreement, written or otherwise, existed. While this distinction may seem minor, it is a crucial difference. In Swearingen, Wheeler, Farmers' & Merchants', Blackwell, Freshwater, Lewis, and Jones, the determining factor was whether the mortgagor was obligated to insure the property for the benefit of the mortgagee based upon some agreement between the parties. Here, such an agreement was unquestionably present. Clearly, the existence of an obligation for Appellant to maintain insurance for the benefit of Respondent makes the instant scenario much more analogous to these cases.

Appellant further cites to the cases of Carrington Mortgage Services v. Riley, 478 B.R. 736 (Bankr. D.S.C. 2012) and Planters' Bank v. Globe & Rutgers Fire Ins. Co., 156 S.C. 453, 153 S.E. 385 (1930) in support of her contention that Respondent has failed to establish an equitable lien on the proceeds of the insurance policy. As with Steinmeyer, these cases are factually distinguishable.

In Carrington, the Bankruptcy Court for the District of South Carolina determined that the Plaintiff, Carrington Mortgage Services established two elements necessary to prove the existence of an equitable lien; namely, the debt and attachment of the debt to the property. However, the Carrington Court determined that Plaintiff failed to prove the third element, the

intent that the property serve as security for the debt. The Bankruptcy Court reasoned that the proceeds were endorsed by the Plaintiff Carrington and the funds were placed into a bank account controlled solely by the Defendant. While Carrington alleged that the Defendant forged the endorsement in its pleadings, the record was devoid of any evidence addressing that allegation. The Bankruptcy Court, thus, reasoned that the endorsement was valid and properly placed into an account subsequently seized by the Trustee and that the proceeds were property of the bankruptcy estate. Obviously; these facts are distinguishable from the instant case at bar.

In Planters' Bank, the Plaintiff/ Appellant sought to recover the proceeds of an insurance policy obtained by lessee of a tract of land owned by its mortgagor. The Plaintiff/ Appellant was the second mortgagee and required the mortgagor to insure the property and assign the insurance policy to its predecessor in interest. Subsequently, the mortgagor leased a portion of the property, upon which a store and dwelling was built by a tenant, with the right to remove the building upon the expiration of the lease. The lessee subsequently obtained an insurance policy on the structure he placed on the leased tract, which named the third mortgagee of the landowner as the loss payee. Shortly after the building was constructed, a fire occurred and the building was destroyed.

The Plaintiff/ Appellant later brought a foreclosure action, in which the subordinate mortgagee and the lessee were named as Defendants, which resulted in a deficiency judgment against the mortgagor. Plaintiff/ Appellant attempted to assert an equitable lien on the proceeds of the insurance policy issued to the lessee of the mortgagor. The South Carolina Supreme Court, in declining to find an equitable lien stated "it is manifest, therefore, that the right could not be enforced where the policy was taken out by someone not connected with the obligation of the mortgagor to take out insurance for the benefit of the mortgagee." Planters' Bank v. Globe &

Rutgers Fire Ins. Co., 156 S.C. 453 at 459. However, as with both Steinmeyer and Carrington, the facts of the case are not analogous. In the case at bar, Appellant clearly was connected to the transaction. She was the mortgagor who pledged the collateral to Respondent. Furthermore, it was her promise to insure upon which the instant case was predicated.

It is clear from the applicable case law, as well as the terms of the Mortgage granted to Respondent by Appellant, pursuant to a Specific Power of Attorney authorizing and ratifying such action, and the facts of this case, that Respondent is entitled to an equitable lien on the proceeds of the insurance policy which is at issue here. The Trial Court properly found the existence of an equitable lien to those proceeds and as such, the decision of the Trial Court should be affirmed.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE APPELLANT MORTGAGOR WAS BOUND BY A COVENANT IN THE MORTGAGE TO INSURE THE SUBJECT PROPERTY AS SECURITY FOR THE MORTGAGE LOAN

Appellant argued at trial and now on appeal that Appellant was not bound by a covenant to insure the real property as additional security for the indebtedness. This is not an accurate statement of the facts of this case. The Trial Court properly found that Appellant was obligated pursuant to the Mortgage to insure the property for the benefit of Respondent, which she failed to do.

It appears that Appellant is attempting to argue that because she was not named as the debtor in the Promissory Note, the agreement to provide insurance contained in the Mortgage could not have been for the better security of Respondent. Appellant further attempts to support this belief by attempting to distinguish the holding from Blackwell as it involved an automobile, and not a residence as in the instant case. This logic is bizarre at best

In submitting this argument, Appellant misinterprets the provisions of the subject Mortgage. Appellant cites to Paragraph 1 of the Mortgage which provides “As further security for all sums secured by this Mortgage, Borrower assigns to Lender all rents and profits arising from the Property, provided however, that so long as no Default as hereinafter defined has occurred, Borrower shall be entitled to collect and retain all such rents and profits as the sole property of Borrower without accounting to Lender thereof.” (HCSB Ex. 6, HCSB Ex. 7). Appellant reasons that had the parties agreed that the insurance proceeds were to act as additional security for the indebtedness, which the Mortgage secured, it would have contained language similar to the language found in Paragraph 1 of the Mortgage. Contrary to Appellant’s reasoning, the Mortgage does just that.

A superficial reading of Paragraph 3 of the Mortgage reveals the obvious intention that the insurance proceeds act as additional security. First, it requires Appellant to obtain insurance coverage “*for the benefit of the Lender* ” What other benefit to Respondent would there be, aside from serving as additional security for the repayment of the indebtedness? It seems Appellant is attempting to argue that the phrase “for the benefit of the Lender” is not analogous to the phrase “as further security”, an argument that was not convincing to the Blackwell Court, and should be as unsuccessful here. Clearly, the intention of the parties was for the insurance, and thus the insurance proceeds, to act as further security for the indebtedness. A continued reading of Paragraph 3 reveals the phrase that the insurance policies “*shall contain a non-contributory mortgage endorsement making losses payable to Lender.*” Again, this is consistent with the intention that the required insurance serve as additional security for the repayment of the indebtedness to Respondent Further reading exposes the phrase: “*in the event of the foreclosure of this Mortgage or any other transfer of title to the Property in extinguishment of the*

*indebtedness and other sums secured hereby, all right, title, and interest of Borrower in and to all insurance policies and renewals thereof then in force shall pass to the grantee* ” This phrase specifically addresses the fact that in the event of foreclosure, all of Appellant’s interest in the insurance policy passes to the grantee, here Respondent. How could this not evidence the intention between the parties that the insurance proceeds act as additional security for the repayment of the indebtedness to Respondent?

Furthermore, Paragraph 3 (B) of the Mortgage, containing the assignment provision, states in pertinent part:

**Borrower hereby assigns to Lender all proceeds from any insurance policies, and Lender is hereby authorized and empowered in its reasonable discretion, to adjust or compromise any loss under any insurance policies on the Property, and to collect and receive the proceeds from any such policy or policies. Each insurance company is hereby authorized and directed to make payment for all such losses directly to Lender alone, and not to Borrower and Lender jointly. After deducting such insurance proceeds any expenses incurred by Lender in the collection or handling of such funds, Lender acting in its sole discretion, may; apply the net proceeds (I) to the payment of any sum secured by this Mortgage in such order as Lender may determine... all without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place.**

It is obvious from just a cursory reading of the provisions of Paragraph 3 that the parties intended upon the insurance proceeds acting as further security for the repayment of the indebtedness due to Respondent. However, the fatal flaw to Appellant’s argument is contained in Paragraph 17 (I) of the subject Mortgage which states: “if the Borrower is not obligated on the debt which this Mortgage secures, then the Borrower acknowledges that Note was made in consideration for this transaction and *the owner of the Property agrees to be bound by the terms and conditions of the Note and the Mortgage* ” (HCSB Ex. 6) (Emphasis Added). While Appellant argues that she is not a debtor on the Promissory Note and thus her agreement to provide insurance was not for the

better security of Respondent; that argument fails based upon the language contained in the Mortgage document itself.

Next, Appellant attempts to distinguish the factual scenario in Blackwell from the instant case by arguing that Blackwell involved a chattel mortgage and not a real estate mortgage. This too is illogical. A chattel mortgage, as no doubt this Court is aware, is no different than a real estate mortgage aside from the object to which it attaches. Furthermore, the Blackwell Court based its ruling upon the previous decisions from Swearingen and Farmers' & Merchants', which incidentally involved real estate mortgages.

Appellant also attempts to distinguish the general equitable principles established by Swearingen, Wheeler, Farmers' & Merchants', Blackwell, Freshwater, Lewis, and Jones by differentiating Appellant as a non-debtor, as opposed to the other cases, which admittedly, concern debtor-mortgagors. While, Appellant is correct that she was not the debtor named in the Promissory Note, this argument is likewise unpersuasive. The hallmark of this line of cases is that there is an agreement between the mortgagor and the mortgagee that the property be insured for the benefit and better security of the mortgagee. The principle from these cases is clear, as stated in Blackwell: "*this equitable lien arises solely from the unperformed contract to protect, the theory being that since equity regards as done that which ought to have been done, if the mortgagor, having so covenanted, fails to make the insurance payable to the mortgagee, or to assign the same, the fund arising therefrom is within the operation of the maxim*" Blackwell at 654. (Emphasis Added). In the instant case, it is absolutely clear that Appellant agreed in the Mortgage to insure the property for the benefit of Respondent during the life of the Mortgage. This is the obligation that Appellant failed to perform. What's more is that Appellant, by virtue of Paragraph 17 (I) of the Mortgage, acknowledged that "the Note was made in consideration of

the transaction” and Appellant agreed to be bound by the terms and conditions of not only the Mortgage, but the Note as well. This in and of itself shows that Appellant’s involvement was more than simply pledging property as collateral. It makes no difference under these facts that Appellant was not the named debtor in the Note, because in the Mortgage itself, she acknowledged that the transaction was made in consideration of the Note and Mortgage and agreed to be bound by those terms. Pursuant to the case law of this State, the resulting equitable lien plainly follows.

Appellant in her brief attempts to argue for the first time on appeal, that Respondent failed to object to the issuance of the check to both Appellant and Respondent. Appellant attempts to point to this as evidence against the Trial Court’s finding of an equitable lien, presumptively, to draw analogy to the Carrington case. However, this argument is not only meritless, but factually inaccurate. In fact, the reason this case went to trial is based upon the manner in which the proceeds were issued. Neither Respondent, nor Appellant were in possession of the funds, nor has either party released their claim to the insurance proceeds. Additionally, Appellant refused to endorse the proceeds check and negotiate it to Respondent, which led to the interpleader action being filed. (Trial Tr., p. 13, lines 3-4; p. 138, line 25- p. 139, line 23). Nevertheless, based upon case law, specifically, Blackwell, Respondent’s equitable lien rights would have been unaffected had the proceeds been paid directly to Appellant. The Blackwell Court, referencing Gibbes Machinery Co. v. Niagara Falls Insurance Co., 119 S.C. 1, 111 S.E. 805 (1922), stated: “if [insurance company], with knowledge of the covenant to insure for the benefit of the Bank, had without its consent, paid the amount of this loss to Blackwell, the right of the Bank to enforce its equitable lien would not have been affected and the Bank could have recovered against [insurance company] the amount of the loss.” Blackwell at 654. The South Carolina Supreme

Court found the covenant contained in the chattel mortgage, requiring the mortgagor to insure “for the benefit of the bank” was sufficient to support a finding of an equitable lien on the insurance proceeds. Id

Again, Appellant has failed to show that the Trial Court’s findings are erroneous in light of the established case law of this State, the facts of this case and the operation of the documents themselves. As such, Respondent submits that the Trial Court’s finding that Appellant was obligated to insure the real property for the further security of Respondent was correct and should be affirmed by this Court.

### III. THE PRIOR ASSIGNMENT OF INSURANCE PROCEEDS IS BINDING ON THE APPELLANT MORTGAGOR AFTER THE CANCELLATION OF THE MORTGAGE INCIDENT TO FORECLOSURE

Appellant argues that the assignment clause contained in Paragraph 3 (B) of the subject Mortgage did not survive the filing of a cancellation of lien, and thus terminated at the conclusion of the prior foreclosure action. Appellant contends that the authority referenced by the Trial Court is inapposite because none of the authority cited references the situation where a “mortgagor was not liable for the indebtedness secured by the mortgage.” (Appellant’s Brief, p. 27) Respondent submits that the Trial Court’s finding that the assignment survived the cancellation of the Mortgage complies with the equitable principles observed by our Appellate Courts and is in accord with the case law of this State

Appellant argues that the cases of Certain Underwriters of Lloyds v U S. Industrial Services, LLC, 825 F.Supp.2d 882 (E.D. Mich 2011) and Jones v. Equicredit Corp. of South Carolina, 347S.C. 535, 556 S.E.2d 713 (Ct. App. 2001) are factually distinguishable from the case at bar. Appellant states that Jones is inapplicable because the dispute involved a debtor-mortgagor. Appellant takes issue with Certain Underwriters of Lloyds because the dispute over the insurance

proceeds was between the holder of tax liens and a mortgagee named in the insurance policy. While Appellant is correct that neither of these cases deal directly with the unique factual scenario this case presents; the principles espoused in the cases utilized by the Trial Court are not compromised. Furthermore, the Trial Court listed the cases of Whitestone S & L Ass'n v. Allstate, 28 N.Y.2d 332, 270 N.E.2d 694 (1971); Smith v. Gen. Mortgage Corp., 402 Mich. 125, 261 N.W.2d 710 (1978), Nationwide v. Wilborn, 291 Ala. 193, 279 So.2d 460 (1973); Allstate v. James, 779 F.2d 1536 (11<sup>th</sup> Cir. 1986), and Helmer v. Texas Farmers Insurance Co., 632 S.W.2d 194 (Tex. App. 1982) as all applying the rule, known as the "Full Credit Bid Rule", espoused in the Emmons v. Lake States Insurance Company, 193 Mich. App. 460, 484 N.W.2d 712 (1992) and Certain Underwriters of Lloyds cases referenced in the Final Order. (Final Order, February 11, 2014, p. 11, ¶ 9).

Appellant is correct in her assessment that none of the cases relied upon by the Trial Court involve a non-debtor mortgagor dispute involving insurance proceeds. This is a case of first impression. However, while Appellant has repeatedly pointed to this difference, she has failed to produce any authority supporting her argument that the outcome would be affected in the scenario involving a non-debtor mortgagor. Aside from referencing Steinmeyer, in which no contractual privity requiring insurance existed, the Appellant has failed to provide any authority which disputes the Trial Court's findings. The Trial Court's ruling is based upon the equitable maxims which lie at the heart of the cases to which it cited. First, if an individual obligates themselves to insure property for the benefit of another, yet fails to do so, then based upon the equitable maxim "equity regards as done that which ought to be done", the Court should place the parties in the position they would have been had the obligation been performed. This is further reinforced by the contractual obligation and duty to protect.

Appellant has only asserted that the conclusion reached by the Trial Court was erroneous because the authority cited in support of the ruling did not involve non-debtor mortgagors; she has not disputed the principles espoused by those cases. Appellant has not disputed the legal conclusions drawn from or represented by the cases; she simply asserts that the cases are discernible in that they derived from relationships involving debtor-mortgagors.

In Emmons, a case utilized by the Trial Court, the Michigan Court of Appeals held that the assignment clause contained in a mortgage will survive a foreclosure so long as the debt is not extinguished. In that case, the Michigan Court of Appeals stated that the insurance clause contained in the mortgage: “created an equitable assignment of a future right. In equity, a present assignment of money having a potential existence but not yet due will operate on the fund as soon as it is acquired. Here, the bank’s interest in the insurance proceeds vested at the time of the fire but expired upon satisfaction of the debt at the foreclosure sale. The assignment was collateral security for the mortgage debt ” Emmons, 193 Mich. App. at 464. (Internal citations omitted). The Emmons Court further opined that while the assignment survived the foreclosure, the debt in that instance did not, as the bank bid the full amount of the indebtedness at the foreclosure sale. Id. “When property is purchased at a foreclosure sale for an amount equal to the amount due on the mortgage, the debt is satisfied.” Id. at 463 *citing to* Bank of Three Oaks v. Lakefront Properties, 178 Mich App. 551, 555, 44 N.W.2d 217 (1989).

In the instant case, however, it is uncontroverted that Respondent did not bid the entire amount of the indebtedness due at the foreclosure sale. In fact, a deficiency of One Hundred Seventeen Thousand Five Hundred Forty Six and 89/100ths Dollars (\$117,546 89) remains after the public auction pursuant to the Order of Foreclosure and Sale. The Trial Court’s ruling is in agreement with the principles upon which the Emmons holding is predicated

In Certain Underwriters of Lloyds, the United States District Court for the Eastern District of Michigan held that the rule from Emmons did not apply in the instance where the debt was not satisfied through the foreclosure sale. Certain Underwriters of Lloyds, 825 F Supp.2d 882, 890 (E.D. Mich 2011) In its discussion, the District Court stated.

**the point of distinction with the present case is that here, a portion of the debt, one that exceeds the amount of available insurance proceeds, remains after the foreclosure sale. The concern animating the holding in Emmons that the bank was not entitled to assigned insurance proceeds appears to be that allowing both assignment of insurance proceeds and a full-debt bid at the foreclosure sale would bestow on a mortgagee a double recovery. However, that concern is absent here...**

Id. In the instant case, there are similarities to the Certain Underwriters of Lloyds case, insofar as the winning bid at the foreclosure sale was less than the indebtedness, and the mortgage required Appellant to obtain insurance for the benefit of Respondent. However, in Certain Underwriters of Lloyds, the bank was named as a loss payee on the policy and the loss occurred after the foreclosure.

It is important to point out that at the trial of the instant case, as is reflected in the Final Order filed February 11, 2014, Respondent confirmed that if it were to prevail, the insurance proceeds would be applied to the deficiency judgment obtained against Quickel and Cajun Carolina, LLC, thus reducing the deficiency award accordingly. (Final Order, February 11, 2014, p. 13, ¶ 14). As in Certain Underwriters of Lloyds, this would prevent the double recovery of concern to the Emmons Court, which clearly influenced their opinion.

In Jones, the South Carolina Court of Appeals followed the reasoning contained in Singletary v. Aetna Cas & Sur. Co., 316 S.C. 199, 447 S.E.2d 869 (Ct App 1994) stating: “Ordinarily, the rights of a mortgagee to insurance proceeds are determined at the time of a fire loss. However, a mortgagee’s rights under an insurance policy are terminated if, after fire loss, the underlying debt

is satisfied by a purchaser at a foreclosure.” 347 S.C. 535 at 543 The Jones Court further reasoned that a waiver of deficiency would not have impaired the bank’s pursuit of the insurance proceeds “A mortgagee who waives deficiency ‘simply elects to rely solely on the mortgage security for satisfaction of his debt.’ By waiving deficiency, a mortgagee relinquishes only the right to pursue assets of the mortgagor over and above those covered by the mortgage.” Jones, 347 S.C. 535 at 544 *citing to* Sellars v. First Colonial Corp., 276 S.C. 548, 551, 280 S.E.2d 805, 806 (1981). In light of the approach taken in Jones, the debt owed to Respondent has not been satisfied, thus Respondent’s claim to the insurance proceeds is viable.

Appellant takes the position that Respondent’s Mortgage was cancelled and satisfied by operation of the filing of the Release of Lien Mortgage Satisfaction on September 8, 2011 in Mortgage Book 5345 at Page 1825, in the Horry County Records. Appellant’s argument is that once the cancellation of the lien occurred, Appellant had no further obligations to Respondent; that upon the filing of the cancellation of lien and securing a deficiency judgment against Quickel and Cajun Carolina, LLC, Respondent was made whole In support of her argument, Appellant relies upon §29-3-660, S.C. Code Ann. (2007). Section 29-3-660, commonly referred to as the “Deficiency Judgment” statute states

**In actions to foreclosure mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.**

Respondent obviously disagrees with this assessment

In opposing Appellant's argument regarding the cancellation of lien, Respondent relies upon §29-3-780, S.C. Code Ann. (2007) which states:

**upon confirmation of the circuit court of the report of the master or the other officer making a sale of lands pursuant to decree of foreclosure, the officer of the court making the sale shall cause to be recorded in the office where the foreclosed mortgage is recorded a release, cancellation, and satisfaction of the lien in the form prescribed in Section 29-3-790. However, nothing in this section may be construed to satisfy any unpaid portion of the debt secured by the mortgage.**

(Emphasis added). Section 29-3-790 provides:

**the release, cancellation, and satisfaction of lien required under Section 29-3-780 must be made in writing and signed by the officer and must be in the following form: 'Lien of mortgage recorded in (Mortgage Book and Page), (Office) is released, canceled, and satisfied by sale under foreclosure the \_\_\_\_ day of (Month), (Year). See Judgment Roll No. \_\_\_\_\_'.**

(Emphasis added)

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature” Hodges v Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) *citing to* Charleston County Sch. Dist. V. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993) “Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.” Id. citing to In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998). “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Id. (citing to Paschal v State Election Comm'n., 317 S.C. 434, 454 S.E.2d 890 (1995)). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Id. citing to Sutherland Statutory Construction § 46.03 at 94 (5<sup>th</sup> ed 1992) “We are not at liberty, under the guise of construction, to alter the plain language of the statute by adding words which

the Legislature saw fit not to include.” Shelley Construction Company v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985). “Our duty is to apply the statute according to its own terms.” Id. citing to Multiplex Building Corp., Inc. v. Lyles, 268 S.C. 577, 235 S.E.2d 133 (1977).

Respondent argued at trial, and again here, that the filing of the Release of Lien Mortgage Satisfaction was a mandatory directive pursuant to §§29-3-780 and 29-3-790 that the Master in Equity for Horry County file the Release of Lien Mortgage Satisfaction form. Based upon the word choice, the Legislature did not grant discretion to the Master in Equity concerning whether the document could be filed incidental to the foreclosure being completed, it demanded that the action be taken regardless. Next, the form of the cancellation is contained in §29-3-790, which again uses mandatory directive language, *i.e.* “must” Lastly, §29-3-780 indicates that “nothing in this section may be construed to satisfy any unpaid portion of the debt secured by the mortgage.” This language contained in the release of mortgage statute directly contradicts Appellant’s argument. The statute specifically states that the cancellation of the mortgage does nothing to extinguish the debt secured by the mortgage as Appellant has suggested. The mandatory filing of the Release of Lien Mortgage Satisfaction by the Master in Equity is a ministerial act, required by statute. If this Court were to accept Appellant’s argument, then the ministerial act required by State law, would negatively and fundamentally impair the rights of lending institutions without any recourse to prevent the harm to them.

Appellant contends that the “Deficiency Judgment” statute renders the debt fully satisfied, arguing that when a mortgagee obtains a deficiency judgment against a debtor, where the sale of the security fails to bring the full amount due under the mortgage, the judgment obtained makes the mortgagee whole. However, nothing in the “Deficiency Judgment” statute indicates that is

the case. Additionally, the Trial Court, in rejecting Appellant's argument in reliance on the "Deficiency Judgment" statute, stated: "reliance upon that statute is misplaced, as the Bank is not seeking a deficiency judgment against Mrs. Jenrette. It claims an equitable lien on insurance proceeds to which Mrs. Jenrette would otherwise be entitled." (Final Order, February 11, 2014, p. 13, ¶ 13). The logic of the Trial Court is sound

Furthermore, the language contained in the Mortgage executed on behalf of Appellant contradicts the argument she urges this Court to accept. Paragraph 3 of the subject Mortgage specifically addresses this scenario. In pertinent part, the Mortgage states:

***3(A) ... In the event of the foreclosure of this Mortgage or any other transfer of title to the Property in extinguishment of the indebtedness and other sums secured hereby, all right, title, and interest of Borrower in and to all insurance policies and renewals thereof then in force shall pass to the grantee. Upon the failure of Borrower to obtain and maintain insurance satisfactory to Lender, Lender may at its own discretion procure and substitute for any and all of the insurance so held as aforesaid, such other policies of insurance, in such amounts as Lender, acting in its sole discretion, may determine; all without prejudice to its right to foreclosure hereunder, should Borrower fail or refuse to keep said premises so insured... 3(B)... Borrower hereby assigns to Lender all proceeds from any insurance policies, and Lender is hereby authorized and empowered in its reasonable discretion, to adjust or compromise any loss under any insurance policies on the Property, and to collect and receive the proceeds from any such policy or policies. Each insurance company is hereby authorized and directed to make payment for all such losses directly to Lender alone, and not to Borrower and Lender jointly. After deducting such insurance proceeds any expenses incurred by Lender in the collection or handling of such funds, Lender acting in its sole discretion, may; apply the net proceeds (I) to the payment of any sum secured by this Mortgage in such order as Lender may determine... all without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place.***

(Emphasis added). Paragraph 3 specifically addresses the issues pertaining to the impact of the foreclosure of the mortgage and its impact upon the assignment of the insurance proceeds. Therefore, construing the language contained in the Mortgage in light of the rules espoused by Emmons, Certain Underwriters of Lloyds, Jones, and the other cases cited by the Trial Court

which adopted the “Full Credit Bid Rule”, as well as §§29-3-780 and 29-3-790, it is clear that Appellant’s argument must fail.

The Trial Court’s ruling, taking into account the bevy of case law with respect to the “Full Credit Bid Rule”, the equitable considerations relating to the covenant by a mortgagor to insure the property for the benefit of the mortgagee; the instructive equitable maxims; the relevant statutes; and the provisions of the documents themselves correctly determined that Respondent was entitled to the insurance proceeds at issue in this case. Appellant has attempted to distinguish the applicable case law based upon Appellant’s position as a non-debtor mortgagor; yet she has failed to provide any authority which assaults the well reasoned findings of the Trial Court. As such, Appellant has failed to carry her burden and the Trial Court’s ruling must be affirmed by this Court.

#### IV THE TRIAL COURT CORRECTLY FOUND THE EXISTENCE OF AN EQUITABLE LIEN ON THE INSURANCE PROCEEDS BASED UPON THE ADDITIONAL SUSTAINING GROUNDS

In addition to the foregoing, the Trial Court’s ruling should be affirmed based upon additional sustaining grounds found in the record. Specifically, Respondent would point to the admission by Appellant that the insurance was obtained for the benefit of Respondent and that the Agreement to Provide Insurance executed by Mr. Quickel identifies the exact policy at issue here, on which Respondent reasonably believed it was named as a loss payee. Both of these grounds provide support to the Trial Court’s ruling that Respondent was entitled to the insurance proceeds resulting from the fire loss on the property which was encumbered by the subject Mortgage.

Appellant, on direct examination, during Respondent's case in chief, testified that she did not obtain the insurance for the benefit of Respondent (Trial Tr., p. 114, line 25- p.115, line 2) This testimony was inconsistent with her deposition testimony, and as a result, Appellant was impeached by Respondent's counsel. Appellant, upon impeachment, agreed that the insurance at issue in this case was obtained for the protection of Respondent. (Trial Tr , p. 115, line 18- p. 116, line 7). While Appellant has attempted to persuade both the Trial Court and this Court that she purchased the insurance coverage from Carrier for her personal benefit; when the documents used in this transaction are viewed in conjunction, it is easy to see how Respondent reasonably believed that the property was insured for its benefit and thus relied upon Appellant's promise and covenant to insure the property.

Appellant has argued that the Loan Commitment is irrelevant to the transaction because it was issued April 24, 2009, Three (3) days prior to Appellant executing the Specific Power of Attorney. However, the Loan Commitment, which was sent to Mr. Quickel at the subject property's address, 104 Country Club Drive, Conway, South Carolina. (HCSB Ex. 3, p. 1) It identified this specific piece of property, along with the other Six (6) unimproved lots, as the collateral for the Three Hundred Fifty Thousand and 00/100ths Dollars (\$350,000 00) loan extended to Mr Quickel and Cajun Carolina, LLC. (HCSB Ex. 3, p. 1) Furthermore, section 10 of the Loan Commitment Letter specifically requires insurance coverage in the amount of the replacement cost for the property listing Respondent as mortgagee/ loss payee on the policy. (HCSB Ex 3, p. 2). There is no question that this requirement was a material term of the loan commitment. It is important to note that Mr. Quickel held no legal or equitable ownership interest in the property, either at the time of, or after, the Loan Commitment Letter's issuance Mr. Quickel was a tenant residing at the property, which was owned, since September 11, 2007,

by Appellant. While Mr. Quickel may have had an insurable interest in the contents of the residence, he would not have been able to obtain an insurance policy covering the structure himself, having no ownership interest in the subject property. It is also of import, that the Loan Commitment Letter specifically provides that the loan documents take precedence over provisions of the Loan Commitment, should any conflict between them exist. (HCSB Ex. 3, p. 2)

On April 27, 2009, Appellant appointed Mr. Quickel as her attorney in fact for the purposes of this transaction (HCSB Ex. 4). In doing so, Appellant specifically references the amount of the loan, \$350,000 00 and the institution from which Mr. Quickel was to obtain the loan, Respondent, Horry County State Bank. (HCSB Ex. 4). This is intriguing, especially in light of Appellant's testimony on direct examination in Respondent's case in chief. Appellant was asked whether she was aware that Mr. Quickel was applying for a loan from Respondent, to which Appellant replied: "sometime during the process I did hear about that, yes" (Trial Tr., p. 109, lines 13-15) Appellant was asked whether she was aware that the subject property was going to be pledged as collateral for the loan, to which her response was: "before he got the loan, that discussion was held" (Trial Tr, p. 109, lines 16-18) Appellant was further asked whether Mr. Quickel had been granted the authority to negotiate a loan using her property as collateral, to which she replied "I did pledge the property" (Trial Tr, p 109, line 23- p. 110, line 1). After being further pressed, Appellant admitted that Mr. Quickel possessed the authority from her to negotiate and obtain a loan from Respondent using her property as collateral, and that she knew he was in fact, attempting to do so (Trial Tr, p. 110, lines 2-23) Appellant's answers to these questions were intentionally evasive and were an attempt to obfuscate the truth, although Appellant eventually answered affirmatively Appellant had to have known the terms of the transaction, because several of the material terms were notably mentioned in the Specific Power

of Attorney. Additionally, the Specific Power of Attorney authorizes Mr. Quickel to procure a \$350,000.00 loan from Respondent and execute a note evidencing that debt, which was unnecessary. Mr. Quickel did not need the authority from Appellant to do those things, if she was only pledging property to be used as collateral as she has claimed. Yet she granted to Mr. Quickel unlimited authority with regard to this transaction. Appellant has argued that the Specific Power of Attorney does not expressly authorize Mr. Quickel to obtain insurance coverage, nor does it mention insurance coverage, and thus this act was not contemplated nor intended. However, this argument is unpersuasive as the document itself indicates that the enumerated powers are not a limitation, but exemplify the general powers he was intended to possess.

At the closing, Mr. Quickel executed an Agreement to Provide Insurance covering the subject property. It is significant that this document references insurance policy number 36223-205638 issued by National Security Fire and Casualty Company, the "Carrier", and obtained from Bradham Insurance Agency. (HCSB Ex. 17) Incidentally, this is the identical insurance policy at issue in this case. This document however, erroneously identifies Cajun Carolina, LLC as the owner of the property and was signed by Mr. Quickel as Member of Cajun Carolina, LLC. There is no question, that this document was signed after the Specific Power of Attorney, which granted to Mr. Quickel the authority to execute this document. While admittedly, Mr. Quickel purports to have signed it in his individual capacity; this error certainly appears to be based upon Cajun Carolina, LLC mistakenly being identified as the owner of the subject property. There is no question, however, that Mr. Quickel, had the document been executed in his capacity as attorney in fact for Appellant, possessed the authority to bind Appellant to the obligation contained therein, just as he did in executing the Mortgage itself. Furthermore, as was stated

above, Mr. Quickel did not, independently of his status as attorney in fact for Appellant, possess an insurable interest in the subject property. The question remains then, where was the insurance information contained on the Agreement to Provide Insurance obtained from, had Appellant not provided the information, or known about the insurance requirement?

It is unquestionable that the subject Mortgage provided for an assignment of insurance proceeds to Respondent, as well as required Appellant to obtain insurance naming Respondent as a mortgagee/ loss payee on the policy. It is also unquestioned that Mr. Quickel had the authority to bind her to that promise by execution of the subject Mortgage, pursuant to the Specific Power of Attorney. Furthermore, Appellant testified considerably concerning her knowledge that the property was being used as collateral for the loan extended to Cajun Carolina, LLC and Mr. Quickel. (Trial Tr., p. 109, line 13- p. 110, line 16). In fact, this transaction was not the first time that Appellant had pledged collateral for loans obtained by her son Appellant testified that she had previously pledged collateral, specifically bank stock, for loans obtained by Mr. Quickel from Respondent. (Trial Tr , p. 109, lines 4-12). This was not a unique scenario for Appellant and Mr. Quickel.

Moreover, Appellant's actions with respect to the insurance policy support Respondent's theory. Appellant has claimed that she purchased the insurance policy for her own benefit because "I had trees that had fallen on a fence. I had the Department of Transportation telling me that trees had to be cut because if people had a wreck I could be sued The trees were in the way I had- my son moved into the house in December of 2008 so that was the first time it was occupied since my mother moved out and they had animals They had horses. They had dogs, cats, lots of vehicles, four-wheelers and all I saw were children playing and other adults in the yard, and so yes, I thought I need insurance for my protection if someone has an accident on that

property.” (Trial Tr , p. 128, line 22- p. 129, line 6). However, Appellant did not obtain the insurance policy until March 9, 2009, at least Three (3) months after her son moved into the subject residence, according to her testimony. Yet she obtained the policy a little more than a month before she agreed to allow her son to pledge the property as collateral for the loan from Respondent. While the original insurance policy was issued prior to the loan closing, the policy was renewed subsequently for the policy period of March 9, 2010 until March 9, 2011. Interestingly, Appellant claimed to have knowledge that the subject property had been pledged to Respondent as collateral for the loan. (Trial Tr., p. 109, line 13- p. 110, line 16) She knew that a mortgage had been executed on her behalf by her son, Mr. Quickel, incidental to obtaining the loan from Respondent. The subject Mortgage was duly recorded on May 4, 2009 and re-recorded on May 5, 2009. (HCSB Ex 6) Appellant has never denied that she was aware that the Mortgage had been filed. However, Appellant failed, even after knowing that Respondent possessed a lien on the real property and that a mortgage had been filed encumbering that improved real property, to indicate Respondent as a mortgagee or loss payee on the insurance policy which is the subject of this action. Surely, she had absolute, actual knowledge that a lien existed on her property, which she had authorized to be placed there. Also, just as assuredly, when she applied for a renewal of the insurance policy, she was aware that she could have named Respondent as a mortgagee on the insurance policy. It is difficult to believe Appellant’s claim that the insurance was obtained solely for her benefit based on the timeline of events. Even if Appellant is given the benefit of the doubt with respect to obtaining the original insurance policy, it becomes increasingly more difficult when considering the renewal policy, because at that time, she had actual knowledge of the existence of the lien. Her failure to name Respondent on the policy at that time, with the knowledge she possessed, was at best negligent and at worst

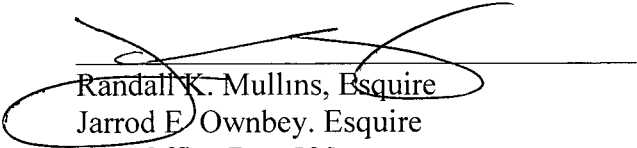
intentional. Clearly, Appellant's actions indicate that the Trial Court's findings and subsequent ruling was correct. As such, the Trial Court's determination should be affirmed.

### CONCLUSION

In summary, Appellant contracted and covenanted in the Mortgage to provide insurance coverage to Respondent concerning the subject property which was pledged as collateral for a loan obtained by Appellant's son. Appellant failed to perform this covenant, instead insuring the property for her own benefit. Although the scenario presented in this case is unique, the Trial Court properly applied the equitable principles espoused by the case law of this State in finding that Respondent had an equitable lien upon the insurance proceeds, and that the assignment provision contained in the subject Mortgage survived the foreclosure and subsequent cancellation of the Mortgage in the public record. Therefore, the Trial Court's Order granting Respondent possession of the escrowed insurance proceeds should be affirmed.

Respectfully submitted,

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Attorneys for Respondent

Dated October 3, 2014  
North Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Family Court

George C. James, Jr., Circuit Court Judge

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Appellate Case No. 2014-001285

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**RECEIVED**

OCT 06 2014

**SC Court of Appeals**

National Security Fire and Casualty Company, Plaintiff,

v.

Rosemary Jenerette, AKA Rosemary Long Jenerette and Horry County State Bank,  
Defendants,

Of whom

Rosemary Jenerette, AKA Rosemary Long Jenerette is the Appellant,

and

Horry County State Bank is the Respondent.

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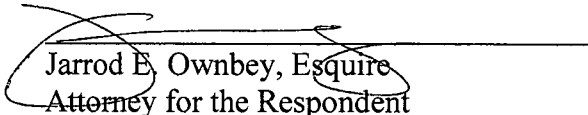
PROOF OF SERVICE

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I certify that I have served a copy of the **Respondent's Initial Brief and Designation of Matter to be included in Record**, on October 3, 2014 addressed to the following:

William W. DesChamps, Jr.  
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October 3, 2014

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

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OCT 06 2014  
**SC Court of Appeals**

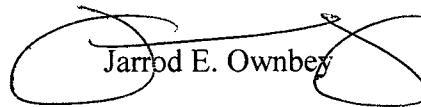
Re: National Security Fire and Casualty Company v. Rosemary Jenerette AKA  
Rosemary Long Jenerette  
Appellate Case No: 2014-001285

Dear Clerk Kitchlings:

Enclosed please find the original and one copy of Respondent's Initial Brief and Designation of Matter to be included in Record on Appeal together with my Proof of Service of the same. By copy of this correspondence I am serving a copy of the same on the Appellant's counsel, William W. DesChamps, Jr., Esquire and William W. DesChamps, III, Esquire.

With warmest regards, I remain

Very truly yours,  
Mullins Law Firm, PA

  
Jarrod E. Ownbey

JEO/ng  
Enclosures

cc: William W. DesChamps, Jr., Esquire  
William W. DesChamps, III, Esquire  
Mr. Robert Smith  
Ms. Sherry Grissett