

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Philip E. Wright, Special Referee

Appellate Case No. 2013-002373

RECEIVED

OCT 08 2014

SC Court of Appeals

H&R Block Bank, FSB..... Respondent,

v.

Ziraili M Elbey a/k/a Ziraili Mohassan El Bey, WKFC Living Trust
Under Trust Agreement Dated June 4, 2010 By and Through its Trustee
Wellesley K Clayton, American Home Mortgage Servicing, Inc.
s/b/m to Option One Mortgage Corporation.. . . . Defendants,

Of whom Ziraili M. Elbey a/k/a Ziraili Mohassan El Bey is the.....Appellant.

INITIAL BRIEF OF RESPONDENT

Chad W Burgess, Esq. (SC Bar# 72520)
Brock and Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
(803) 454 3540

G Benjamin Milam, Esq. (SC Bar#80311)
McGureWoods LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202
(704) 343 2000

Attorneys for Respondent H&R Block, FSB
October 8, 2014

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1
Facts	2
Standard of Review	5
Argument	
1. THE LANCASTER SPECIAL REFEREE PROPERLY REINSTATED THE JUDGMENT OF FORECLOSURE SUBSEQUENT TO MS. ELBEY'S DISCHARGE BY THE BANKRUPTCY COURT	5
Conclusion	9

TABLE OF AUTHORITIES

CASES

<u>Bank of America, N.A. v Draper</u> , 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013)	8, 9
<u>l'On v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	5
<u>Lowcountry Open Land Trust v. Charleston S. Univ.</u> , 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008)	5
<u>Ex parte Moore</u> , 346 S C. 274, 550 S.E.2d 877 (Ct. App. 2001)	7, 9
<u>Perry v. Heirs at Law of Gadsden</u> , 357 S.C. 42, 590 S E.2d 502 (Ct. App 2003)	7
<u>Ex parte Reichlyn</u> , 310 S C 495, 427 S.E.2d 661 (1993)	6
<u>Shirley's Iron Works v City of Union</u> , 403 S.C. 560, 743 S.E.2d 778 (2013)	6
<u>In re Singleton</u> , 358 B.R. 253 (D.S.C. 2006)..	6, 9
<u>Tench v. South Carolina Dept. of Educ.</u> , 347 S C. 117, 553 S.E.2d 451 (2001)	7, 8
<u>In re Thames</u> , 344 S.C. 564, 544 S.E.2d 854 (Ct. App. 2001)	6, 7
<u>U.S. Bank Trust Nat. Ass'n v. Bell</u> , 385 S.C 364	5
<u>In re Weatherford</u> , 413 B.R 273 (Bankr D.S C. 2009).....	6

STATUTES

11 U.S.C § 362(a)(1)	6, 9
11 U.S C. § 362(c)(2)	6, 9
S.C Code § 33-15-101	8

OTHER AUTHORITIES

SCRCP 60 7, 8
SCRAP 220(c) 5

STATEMENT OF ISSUES ON APPEAL

- 1 DID THE LANCASTER SPECIAL REFEREE ERR IN REINSTATING RESPONDENT'S JUDGMENT OF FORECLOSURE AGAINST APPELLANT SUBSEQUENT TO APPELLANT'S DISCHARGE BY THE BANKRUPTCY COURT?

STATEMENT OF THE CASE

Respondent, H&R Block Bank, FSB (the "Bank") filed this action in Lancaster County, South Carolina on January 14, 2011 seeking foreclosure of Appellant, Ziraili M. Elbey a/k/a Ziraili Mohassan El Bey ("Ms. Elbey")'s property for failure to make payments required by the terms of her mortgage. (Complaint pp. 1-5) Ms. Elbey filed an Answer and Counterclaims on March 28, 2011 challenging the standing of the Bank to enforce the Note and Mortgage. (Answer and Counterclaim pp. 1-3.) The case was subsequently referred to Special Referee Philip Wright for disposition. (Order of Reference p. 1) On August 22, 2012 the Special Referee granted summary judgment of foreclosure in favor of the Bank and ordered the property to be sold at public auction. (Special Referee's Report and Judgment of Foreclosure and Sale pp. 5-8) Ms Elbey did not appeal from this judgment.

Two days after issuance of the foreclosure judgment, Ms. Elbey filed a petition for bankruptcy in the United States Bankruptcy Court for the District of South Carolina (Motion and Order of Stay Due to Bankruptcy p 1.) As a result of the bankruptcy filing, the Special Referee ordered that the judgment of foreclosure be stayed and that the case be stricken from the active case roster with leave to restore upon completion of the bankruptcy action (Motion and Order of Stay Due to Bankruptcy p. 1.) Ms. Elbey was granted a discharge by the Bankruptcy Court on January 14, 2013. (Motion and Order to Restore, Exhibit A.) Subsequently, the Bank filed a motion to restore the case to the active roster, which was granted by the Special Referee on July 29, 2013. (Motion and Order to Restore p 1.)

A supplemental hearing was held on October 24, 2013 for the purpose of updating the amount of the foreclosure judgment and to hear various motions filed by Ms. Elbey seeking to set aside the foreclosure judgment. (Transcript of October 24, 2013 Hearing.) On October 29, 2013, Ms. Elbey filed a Notice of Appeal to the South Carolina Court of Appeals in anticipation of the judgment subsequently entered against her by the Special Referee. (Notice of Appeal p. 1.) On November 12, 2013, the Special Referee issued a Supplemental Special Referee's Report and Judgment of Foreclosure and Sale, which re-affirmed the judgment of foreclosure and updated the amount of the judgment to reflect additional accrued interest, charges and fees. (Supplemental Special Referee's Report and Judgment of Foreclosure Sale pp. 4-7)

FACTS

Ms. Elbey made, executed and delivered a note, dated March 29, 2006, promising thereby to pay to the order of Option One Mortgage Corporation the sum of \$197,186.00 with an interest rate of 7.999% per annum. (Special Referee's Report and Judgment of Foreclosure and Sale p. 2) To better secure payment of the note, Ms Elbey made, executed and delivered a mortgage to Option One Mortgage Corporation encumbering real property located in Lancaster County. (Id.) The mortgage was recorded April 7, 2006 in the Lancaster County Registry in Book 1486, Page 1. (Id) Thereafter the mortgage was assigned to the Bank as recorded on August 5, 2010 in Book 2265, Page 129. (Id) The Bank is the holder of the note and mortgage. (Id.)

On January 14, 2011, the Bank filed a Complaint for mortgage foreclosure against Ms. Elbey as a result of her failure to pay on the mortgage for the installments due March 1, 2010 and thereafter. (Complaint p. 3.) On January 15, 2011, a process server served Ms Elbey with a copy of the Summons and Complaint through substitute service. (Affidavit of Service p.1.)

Ms. Elbey filed and served an answer on March 28, 2011. (Answer and Counterclaims.) On June 1, 2012 the Clerk of Court for Lancaster County entered an Order of Reference referring this matter to The Honorable Philip E. Wright as Special Referee. (Order of Reference p. 1.) A Notice of Final Hearing was sent August 3, 2012, informing the defendant that a final hearing was scheduled for August 22, 2012. (Notice of Final Hearing p. 1.) Ms. Elbey did not attend the August 22, 2012, hearing or seek a continuance. (Transcript of Aug. 22, 2012 Hearing p. 5.) The Court ruled in favor of the Bank and issued a judgment of foreclosure and sale, finding that the Bank was the holder of the subject note and mortgage, that Ms. Elbey had failed to make payments required by the note, and that the total debt secured by the note and mortgage was \$233,312.88. (Special Referee's Report and Judgment of Foreclosure and Sale pp. 2-8.) The Court denied all motions made by Ms Elbey. (Transcript of August 22, 2012 Hearing p. 12)

Two days after the judgment, Ms. Elbey filed a petition for bankruptcy in the United States Bankruptcy Court for the District of South Carolina. (Motion and Order of Stay Due to Bankruptcy p 1.) As a result of the bankruptcy filing, the Special Referee ordered that the judgment of foreclosure be stayed and that the case be stricken from the active case roster with leave to restore upon completion of the bankruptcy action. (Motion and Order of Stay Due to Bankruptcy p. 1.) Ms. Elbey was granted a discharge by the Bankruptcy Court on January 14, 2013. (Motion and Order to Restore Exhibit A.) Subsequently, the Bank filed a motion to restore the case to the active roster, which was granted by the Special Referee on July 29, 2013. (Motion and Order to Restore p. 1.)

In response to the Order to Restore, Ms. Elbey filed several motions and filings attempting to contest the issues previously determined in the foreclosure judgment. (Answer to Plaintiff's Motion and Order to Restore filed August 5, 2013; Defendant's Motion to Vacate

Judgment of Foreclosure Sale filed August 6, 2013; Defendant's Refusal to Plaintiff's Offer to Contract filed August 9, 2013; Defendant's Motion to Amend and Set Aside or Void Judgment filed August 20, 2013, and Defendant's Release Deficiency Demand and Foreclosure Judgment filed August 21, 2013.) These motions and filings generally argued that the Bank had no standing to enforce the subject note and mortgage.

On September 26, 2013, the Bank filed a motion to strike the pleadings and a motion for sanctions against Ms. Elbey due to the sham nature of her filings. (Motion to Strike and Motion for Sanctions.) On October 24, 2013, the court heard the Bank's motion and all other pending matters. (Transcript of October 24, 2013 Hearing.) At the hearing, Ms. Elbey again sought to argue that the Bank had no standing to foreclose on the lien of the mortgage. (Transcript of October 24, 2013 Hearing pp. 21-30.) The Special Referee rejected Ms. Elbey's arguments and noted, "[t]hese are in fact sham pleadings. These are, in fact, documents and defenses that are designed to delay and cause exactly what has been happening in this case and that is a delay in the prompt distribution of justice in this case under the law." (Transcript of Oct. 24, 2013 Hearing p. 31.) The court granted the Bank's motion for sanctions and advised the parties,

I'm also going to grant the motion of the Plaintiff for sanctions and I'm going to ask the Plaintiff to prepare a motion - - prepare an order for me that says that if another sham pleading is filed with this Court that the Court will take action to prevent the filing of other sham pleadings and that if this matter is appealed to the South Carolina Appeals - - Court of Appeals, that the Court would be notified of the proceedings below and that the fact that the Court has found that you have filed sham pleadings in this case to delay this action and that there should be no further delay in this process of getting this property sold."

(Transcript of October 24, 2013 Hearing p 48.)

On October 29, 2013, Ms. Elbey filed a Notice of Appeal to the South Carolina Court of Appeals in anticipation of the judgment subsequently entered against her by the Special Referee. (Notice of Appeal p 1.) On November 12, 2013, the Special Referee issued a Supplemental

Special Referee’s Report and Judgment of Foreclosure and Sale, which re-affirmed the judgment of foreclosure and updated the amount of the judgment to \$259,935.53 to reflect additional accrued interest, charges, and fees. (Supplemental Special Referee’s Report and Judgment of Foreclosure Sale pp 4-7.)

STANDARD OF REVIEW

“A mortgage foreclosure is an action in equity.” Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) “In an appeal from an action in equity, the appellate court may find facts in accordance with its own view of the preponderance of the evidence.” Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct App 2008) Nevertheless, “the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings.” U.S. Bank Trust Nat. Ass’n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (quoting Pinkney v. Warren, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623) The Court may affirm the trial court’s ruling for any ground appearing in the record. SCACR 220(c); see also I’On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)

ARGUMENT

1. THE SPECIAL REFEREE PROPERLY REINSTATED THE JUDGMENT OF FORECLOSURE SUBSEQUENT TO MS. ELBEY’S DISCHARGE BY THE BANKRUPTCY COURT.

Ms. Elbey did not appeal the Special Referee’s original judgment of foreclosure against her on August 22, 2012. The findings and conclusions in the judgment therefore became the law of the case, and the only issue properly on appeal is whether the Special Referee correctly reinstated the judgment upon Ms. Elbey’s discharge by the United States Bankruptcy Court.

Because Ms. Elbey's discharge operated to remove her assets from the protection afforded by the automatic bankruptcy stay, the Special Referee's reinstatement of the judgment with updated interest, charges, and fees was proper.

The filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against that debtor that was or could have been commenced before the commencement of the case under this title or to recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(1). The automatic stay is broad in scope and its operation is automatic upon the filing of the petition. In re Weatherford, 413 B.R. 273, 283 (Bankr. D.S.C. 2009). The South Carolina Supreme Court has stated that the automatic bankruptcy stay "deprives the trial court of subject matter jurisdiction to take any action inconsistent with the stay." Ex parte Reichlyn, 310 S.C. 495, 499, 427 S.E.2d 661, 663-64 (1993).

The automatic stay continues in effect until the earliest of (1) the time the bankruptcy case is closed, (2) the case is dismissed, or, (3) in a case brought under Chapter 7, 9, 11, 12, or 13 of the Bankruptcy Code, the debtor is discharged. 11 U.S.C. § 362(c)(2). Once the automatic stay has been terminated by one of the foregoing events, the debtor's assets are no longer protected and creditors may proceed with foreclosure. In re Singleton, 358 B.R. 253, 256 (D.S.C. 2006).

An unappealed ruling is the law of the case and requires affirmance. Shirley's Iron Works v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013); see also In re Thames, 344 S.C. 564, 573, 544 S.E.2d 854, 858 (Ct. App. 2001) ("The unappealed decision of the trial court, right or wrong, is the law of the case."). After the time has expired for an appeal of a

judgment, a party may be able to seek relief from the judgment to the extent permitted by SCRCP 60, which permits a party to obtain relief from judgments and orders due to clerical mistakes, inadvertence, excusable neglect, fraud, and similar grounds. However, a party cannot invoke relief under Rule 60 where it could have pursued the issue on appeal. Tench v. South Carolina Dept. of Educ., 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001).

Pursuant to South Carolina Rule of Civil Procedure 60(b)(5), a court may modify its prior decrees to address subsequent changes in conditions. Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003) (stating that S.Car.R.Civ.P. 60(b)(5) is based on the historical power of a court of equity to modify its decree “in light of subsequent conditions.”) Thus, a trial court “has authority to modify all orders affecting [a foreclosure] sale by subsequent orders.” Ex parte Moore, 346 S.C. 274, 287, 550 S.E.2d 877, 883 n.8 (Ct. App. 2001) (internal quotations omitted), rev'd on other grounds, 352 S.C. 508, 575 S.E.2d 561 (2003).

In this case, Ms. Elbey did not appeal from the special referee’s original judgment of foreclosure issued against her on August 22, 2012. That judgment therefore became the law of the case and may not be subsequently attacked on grounds which were available to Ms. Elbey at the time of the judgment. See In re Thames, 344 S.C. 564, 573, 544 S.E.2d 854, 858 (Ct. App. 2001) (“The unappealed decision of the trial court, right or wrong, is the law of the case.”). Nor did Ms. Elbey properly bring a motion under Rule 60, SCRCP for relief from this judgment. Thus, the validity of the original foreclosure judgment has not been preserved for appeal

To the extent that Ms. Elbey’s filings subsequent to the special referee’s order to restore the case to the active roster can be considered attempts to seek relief from the foreclosure judgment under Rule 60, she did not allege any grounds that would support relief under the Rule.

Although Ms. Elbey has repeatedly claimed that the judgment of foreclosure was obtained through fraud, she did not provide any evidence of fraud. Instead, Ms. Elbey argued that the Bank does not have standing to enforce the terms of the Note and the Mortgage, an issue which was determined in the August 22, 2012 judgment. Since Ms. Elbey failed to appeal the original foreclosure judgment finding that the Bank did have the required standing, she was not entitled to seek relief from the judgment on those grounds. See Tench v. South Carolina Dept. of Educ., 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001) (holding that a party cannot invoke relief under Rule 60 where it could have pursued the issue on appeal).

Even if Ms. Elbey were permitted to have her arguments considered on their merits, the arguments are meritless. Ms. Elbey claims that the Bank does not have authority to enforce its mortgage on the grounds that it has not obtained a certificate of authority to transact business in the State of South Carolina. However, S.C. Code § 33-15-101 specifically exempts “creating or acquiring any indebtedness, mortgages, and security interests in real or personal property” and “securing or collecting debts or enforcing mortgages, security interests, or other rights in property securing debts” from the activities for which a certificate of authority is required. S.C. Code § 33-15-101(7), (8)

Likewise, Ms. Elbey’s assertion that securitization of the loan wipes out the mortgage obligation is unsupported under South Carolina law. The holder in possession of a mortgage-backed promissory note may enforce the note and mortgage without a further showing that it is the beneficial owner of the note. See Bank of America, N.A. v. Draper, 405 S.C. 214, 220-22, 746 S.E.2d 478, 481-82 (S.C. Ct. App. 2013) (finding that a loan servicer was a real party in interest with standing to enforce the note and mortgage). Accordingly, securitization of the loan cannot affect a holder’s right to enforce the note and mortgage. Furthermore, contrary to Ms.

Elbey's assertions, production of the original note is not required to establish a party's right to enforce the note and mortgage if the party can otherwise establish that it holds the note or has the rights of a holder. Draper, 405 S.C. at 223-24, 746 S.E.2d at 482-83 (finding that a loan servicer had proven its possession of a note even though only a facsimile of the note was offered into evidence).

Since Ms. Elbey cannot properly challenge the original judgment of foreclosure on appeal, the only issue to be resolved is whether the Special Referee correctly reinstated the judgment subsequent to Ms. Elbey's discharge by the Bankruptcy Court. Upon discharge, Ms. Elbey's assets ceased to be protected by the automatic stay under 11 U.S.C. § 362(a)(1) and the Bank was entitled to proceed with foreclosure. See 11 U.S.C. § 362(c)(2)(C); In re Singleton, 358 B.R. 253, 256 (D.S.C. 2006). The trial court's reinstatement of the foreclosure judgment on November 12, 2013 was therefore proper. The trial court also properly updated the amount of the judgment to include interest, charges, and reasonable attorney's fees accruing during the delay occasioned by the bankruptcy action and by Ms. Elbey's numerous filings subsequent to the restoration of the foreclosure to active roster. See Ex Parte Moore, 346 S.C. at 287, 550 S.E.2d at 883 n 8 (stating that that a trial court has authority to modify all orders affecting a foreclosure sale by subsequent orders). At no time has Ms. Elbey contested the amount of updated interest, charges, or fees as identified in the November 12, 2013 judgment.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Circuit Court.

October 7th, 2014.



Chad W. Burgess, Esq. (SC Bar# 72520)
Brock and Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
(803) 454 3540

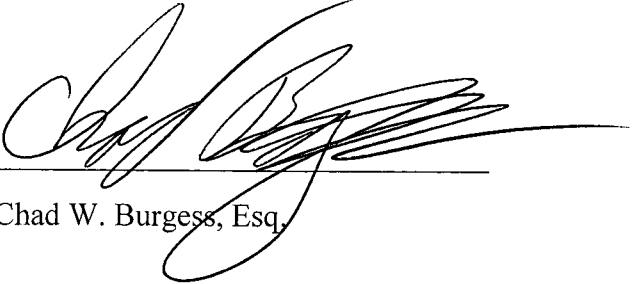
G. Benjamin Milam, Esq. (SC Bar#80311)
McGuireWoods LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202
(704) 343-2000
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that the Initial Brief of Respondent was served on the Appellant by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

Ziraili M. Elbey
9789 Charlotte Highway, #400-191
Indian Land, South Carolina 29707
Appellant

This the 7th day of October, 2014.



Chad W. Burgess, Esq.

RECEIVED
OCT 08 2014
SC Court of Appeals

**BROCK
& SCOTT**
PLLC

COLUMBIA OFFICE

WESTPARK CENTER
3800 FERNANDINA ROAD
SUITE 110
COLUMBIA, SC 29210
PHONE 803-454-3540
FAX 803-454-3541

THOMAS E BROCK *
GREGORY A SCOTT *
JAMES P BONNER *
MARK A PEARSON **
BRIAN L CAMPBELL**
SEAN M CORCORAN*

ATLANTA, GA
CHARLOTTE, N C
RALEIGH, NC
WILMINGTON, NC
WINSTON-SALEM, NC
COLUMBIA, SC
FRANKLIN, TN

www.brockandscott.com

* Licensed in North Carolina

** Licensed in North Carolina and South Carolina

October 7, 2014

RECEIVED

OCT 08 2014

SC Court of Appeals

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

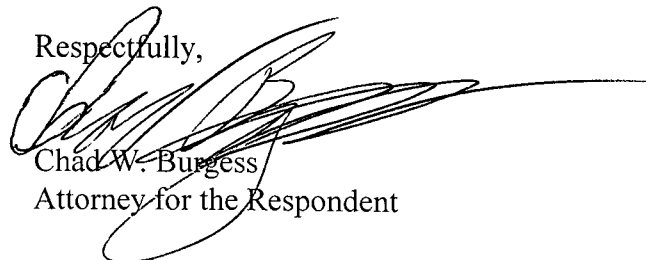
RE: H&R Block, FSB v Ziraili M. Elbey
Appellate Case 2013-002373
B&S File No.. 10-19401

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal for the above-referenced case. Please have a filed copy returned to me in the enclosed envelope.

Thank you for your kind assistance in this matter.

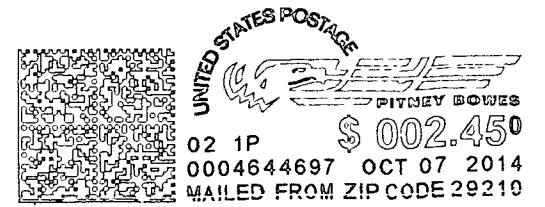
Respectfully,



Chad W. Burgess
Attorney for the Respondent

Enclosure
CC Ziraili M. Elbey

*** THIS IS AN ATTEMPT TO COLLECT A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. IF YOU HAVE BEEN DISCHARGED IN A CHAPTER SEVEN BANKRUPTCY, WE ARE NOT SEEKING PERSONAL LIABILITY AGAINST YOU, BUT ARE PURSUING THE RIGHTS AGAINST THE PROPERTY AS PROVIDED IN THE SECURITY AGREEMENTS***



02 1P \$ 002.45⁰
0004644697 OCT 07 2014
MAILED FROM ZIP CODE 29210

Brock and Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, South Carolina 29210

RECEIVED

OCT 08 2014

SC Court of Appeals

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