

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from the Court of Common Pleas  
For Georgetown County  
Honorable Benjamin H. Culbertson, Circuit Judge  
Civil Action No : 2012-CP-22-00889  
Appellate Case No.: 2014-001104

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Alexander Mangialardo and Audra Mangialardo ..... Appellants,

v.

Blue Ridge Ventures, LLC, Gerald W. Kelly, Elizabeth L. Kelly,  
South Carolina Bank & Trust, NA, Century 21 – The Beach Company, LLC,  
Cason Engineering Company, Inc , Keith Duncan,  
Attorneys Title Insurance Fund, Inc., G. Turner Perrow, Jr and  
Tidelands Law, LLC . . . . . Defendants,

Of Whom Blue Ridge Ventures, LLC, Gerald W. Kelly, Elizabeth L. Kelly,  
Cason Engineering Company, Inc , Keith Duncan, Attorneys Title Insurance  
Fund, Inc., G Turner Perrow, Jr and Tidelands Law, LLC  
are the . . . . . Respondents

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INITIAL BRIEF OF RESPONDENTS  
GERALD W. KELLY and ELIZABETH L KELLY

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DEC 11 2014  
**SC Court of Appeals**

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*Main v. Corley* 281 S C 525, 316 S.E.2d 406 (S C , 1984)

*Schnellmann v. Roettger* 368 S.C. 17, 627 S E 2d 742, (S.C.App. 2006) (affirmed as modified 373 S.C 379, 645 S E 2d 239, (S C , 2007)

*Shropshire v. Jones*, 277 S.C. 468, 289 S E.2d 410 (1982)

*Trousdell v. Cannon*, 351 S C 636, 572 S E.2d 264 (2002)

*Williams v. Chesterfield Lumber Company*, 267 S C. 607, 230 S E.2d 447 (1976)

### Statutes and Rules

Rule 56(c), SCRPC

### Other Authorities

55 Am. Jur 2d Mortgages § 719.

CJS “Mortgages,” §1211.

## STATEMENT OF ISSUES ON APPEAL

- I Did the Appellants appeal the central issue in this case?
- II. Did the Trial Court correctly grant summary judgment on the issue of property damage because the foreclosure sale divested Appellants of any damages for such?
- III Did the Trial Court correctly grant summary judgment on the issue of personal injuries because no evidence was presented to support that claim?

## STATEMENT OF THE CASE

The Kellys agree to the Statement of the Case set forth in Appellants' brief

## STATEMENT OF FACTS

This case arises out of a real estate boundary dispute in which Plaintiffs allege that Defendants caused them to purchase a residence (hereinafter "Property") that encroached into a Santee Cooper power line easement. (Exhibit A, Plat) The Property was subdivided from a larger tract of land in Pawleys Island in the early 2000's. In 2004, Caledonia Development Company of SC sold the Property, an unimproved lot at that time, to Keith Duncan for \$97,700 00. Then in 2006, Duncan sold the Property to Blue Ridge Ventures, LLC, and Gerald and Elizabeth Kelly, who held title as tenants-in-common. The Kellys' credit was used to obtain a construction loan to build a "spec" house on the lot. Each of these deeds in the chain of title reference a plat of record

prepared by Beasley Land Surveying, Inc., dated 3/27/2002 and recorded 3/20/2006, which shows the Property to be free and clear of any encroachments except the Santee Cooper easement.

According to Plaintiffs' Complaint, around 2006, Caison Engineering drafted architectural plans for a large residence to be constructed on the Property. Keith Duncan constructed the residence pursuant to Caison's blueprints over the course of the following year. In 2007, the Property was listed with Century 21 and its affiliated partner, The Beach Company. In late summer 2007, Plaintiffs visited an "open house" tour hosted by Century 21, and shortly thereafter made an offer to purchase the Property. After negotiations, the parties agreed upon a sale price of \$452,900, which they memorialized in a purchase and sale agreement dated September 30, 2007. (Exhibit B, Buy Sell Agreement) The Kellys were not parties to this agreement.

The Plaintiffs were represented by their own attorney at the closing. The deed was recorded October 23, 2007, (Exhibit C, Deed). The Plaintiffs moved into the house shortly thereafter.

A conspicuous above-ground power line operated by Santee Cooper runs immediately adjacent to the home. Santee Cooper owns a 50-foot utility easement in connection therewith. When Plaintiffs purchased the Property, Santee Cooper ran only one transmission line within the easement. Then, in April, 2010, two and a half years after Plaintiffs moved into the house, Santee Cooper began to expand the lines. The

proximity of the home to the easement prompted Santee Cooper to conduct a GPS survey. The survey indicated Plaintiffs' home encroached into the easement. A subsequent engineered survey indicates the house encroaches less than two and one half feet into the easement. Santee Cooper also tested the Property for Electric and Magnetic Fields (EMF) emissions, and the results showed the presence of elevated levels of electro magnetic fields (EMFs). Apparently in response to anxieties about the EMF readings, Plaintiffs vacated the Property in April, 2010, soon after speaking with Santee Cooper. In August of 2011, after Plaintiffs stopped making payments, Bank of America, the assignee of the mortgage, foreclosed on the loan and sold the Property at public auction in September of 2011. The bank waived its right to a deficiency judgment, thereby forgiving the Appellants of a debt of approximately \$340,000.00.

Neither of the Appellants or their children have suffered any problem from the EIFS or any defect in the house.

### **ARGUMENTS** **Standard of Review**

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP. *Cowburn v. Leventis*, 366 S C 20, 30, 619 S.E.2d 437, 443 (Ct.App.2005) (citing *Trousdell v. Cannon*, 351 S C 636, 639, 572 S E.2d 264, 265 (2002)). In considering a motion for summary judgment, the trial court must view the evidence in the light most favorable to the party

opposing the motion *Shropshire v. Jones*, 277 S.C 468, 289 S E 2d 410 (1982) Summary judgment is appropriate in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ *Williams v. Chesterfield Lumber Company*, 267 S C 607, 230 S E 2d 447 (1976).

A motion for summary judgment is akin to a motion for a directed verdict In each instance, one party must lose as a matter of law. A motion for a directed verdict speaks in terms of “only one reasonable inference.” A motion for a summary judgment speaks in terms of “no genuine issue as to material facts.” It is not sufficient that one create an inference which is not reasonable Similarly, it is not sufficient that one create an issue of fact that is not genuine. *Main v. Corley* 281 S.C 525, 526-527, 316 S.E 2d 406, 407 (S.C., 1984)

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law *Id*; Rule 56(c), SCRPC. *Knight v. Austin*, 396 S C 518, 522, 722 S.E 2d 802, 804 (S.C.,2012)

The moving party need not support its motion with affidavits or other similar materials negating the opponent's claims but rather must clearly establish by the record the absence of a triable issue of fact. With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-

moving party's case. *Baughman v American Tel. & Tel. Co.*, 306 S C 101, 115,410 S.E 2d 537, 545 (1991).

## ARGUMENTS

### **I. Appellants fail to appeal the Trial Court's ruling that the property damage claims were lost through the foreclosure action.**

The Trial Court held "There are no damages flowing to the [Appellants] from the encroachment since [they] no long own the property." (Order for SJ, page 6). The Trial Court further held "[t]he [Appellants] cannot recover even if the property is unmarketable, is uninhabitable, or has diminished value since they no longer own the property" (Order for SJ, P 6) Finally, the Trial Court held " the [Appellants] lack standing to assert claims arising out of the ownership of the house and the same are mooted as a result of the foreclosure sale "

The Appellants fail to address this, the central issue in this appeal. While they argue they suffered damages, they do not address the Trial Court's holding that the foreclosure action and the waiver of the deficiency precludes them seeking recovery for those damages. The Trial Court never said Appellants did not suffer damages but their right to recover them was foreclosed by the waiver of the deficiency and the transfer to the mortgagee. This is the central issue in the case and is not preserved for review. An unappealed ruling, whether right or wrong, becomes the law of the case. *Buckner v. Preferred Mutual Insurance Co.*, 255 S C 159, 177 S E.2d 544 (S C. 1970)

II. Even if the issue is preserved in this appeal, the Trial Court was correct because the foreclosure sale transferred the right to pursue property damage claims to the bank.

Except in those jurisdictions where a mortgage on real estate passes title to the mortgagee, the purchaser at a foreclosure sale succeeds to the equitable interest of the mortgagee, and when no redemption is made, this interest draws to it the subordinate legal title of the mortgagor, and his or her title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; in other words, the mortgage ripens into a perfect title through the process of foreclosure. The purchaser takes the title of the mortgagor as of the time when the mortgage lien was created. The effect of the foreclosure sale is to vest in the purchaser the entire interest and estate of the mortgagor and the mortgagee as of the date of the mortgage, unaffected by subsequent action 55 Am. Jur 2d Mortgages § 719

If the mortgagee becomes the purchaser, his or her title at the expiration of the time, if any, allowed by law for redemption from the sale, relates back to the date of the mortgage, and the rule is also applicable where a stranger becomes the purchaser. CJS “Mortgages,” §1211.

This is an equitable result. The forgiveness of the debt by the bank is essentially a payment of that money to the Appellants. The Appellants should not be allowed to abandon the property to the bank, be forgiven a debt of more than \$300,000.00 and

still be allowed to pursue property damages. The truly damaged party here is the mortgagee who should have the right to pursue property damages if anyone should

Therefore, as a result of the foreclosure sale and the waiver of the deficiency, the purchaser at the foreclosure sale acquired any rights to damages to the property.

**III. The Trial Court correctly granted summary judgment on the personal injury causes of action because the Appellants did not produce any evidence to show any damages.**

Trial Court granted summary judgment on the personal injury causes of action because: “Nothing has been presented to show EMFs cause any health hazard in this case.” Also, “Plaintiffs have testified that nobody in their family has been diagnosed with any condition or illness related to the EMFs.” Plaintiffs testified that nobody in their family has been diagnosed with any condition or illness related to the EMFs  
Audra Mangialardo's Dep pp 102:24-108:22 [Order for Summary Judgment, page 5]

A party's inability to establish the requisite elements of a cause of action make the trial court's award of summary judgment entirely appropriate. Schnellmann v. Roettger, 368 S.C. 17, 23, 627 S.E.2d 742, 745 (S.C.App.,2006) (affirmed as modified 373 S.C. 379, 645 S.E.2d 239, S.C.,2007). Damages are required elements of the causes of action related to the personal injury claims.

The Appellants argue they presented evidence that EIFS have the “potential” to be harmful. (Appellants' Initial Brief, P. 16). Even if that is the case, the evidence

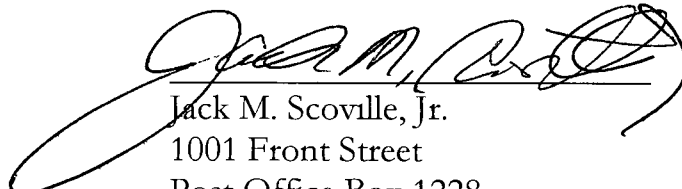
presented was undisputed that they had not suffered any harm in fact. No evidence was presented that they would likely suffer harm in the future. Since they had long vacated the house when the Appellants' depositions were taken, there is no possibility of harm, potential or otherwise.

Summary judgment was appropriate because no evidence of damages was presented that Appellants suffered any personal injuries

### CONCLUSION

At the time this case was called for argument, the Appellants had to present evidence to support their claims for damages. They utterly failed to do so. The claims for property damage passed to the bank upon the foreclosure. They produced no evidence of any personal injuries. Summary judgment was appropriate under these facts

Respectfully Submitted,



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December 9, 2014

Georgetown, South Carolina

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM GEORGETOWN COUNTY  
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Alexander Mangialardo and Audra Mangialardo

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Attorneys Title Insurance Fund, Inc , G Turner Perrow, Jr and  
Tidelands Law, LLC

Defendants,

Of Whom Blue Ridge Ventures, LLC, Gerald W Kelly, Elizabeth L Kelly,  
Caison Engineering Company, Inc , Keith Duncan,  
Attorneys Title Insurance Fund, Inc , G Turner Perrow, Jr and Tidelands Law, LLC  
are the Respondents

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CERTIFICATE OF COUNSEL

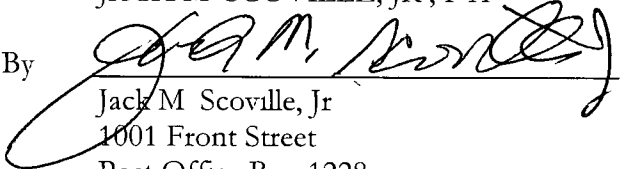
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The undersigned hereby certifies that the Initial Brief of Respondents Gerald W Kelly and Elizabeth L Kelly in the above-captioned matter complies with Rule 211(b)

Respectfully Submitted,

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(Appellate Case No : 2014-001104)

Alexander Mangialardo and Audra Mangialardo ..... Appellants,

v.

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Tidelands Law, LLC ..... Defendants,

Of Whom Blue Ridge Ventures, LLC, Gerald W. Kelly, Elizabeth L. Kelly,  
Cason Engineering Company, Inc , Keith Duncan,  
Attorneys Title Insurance Fund, Inc , G. Turner Perrow, Jr and Tidelands Law, LLC  
are the ..... Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents Gerald W. and Elizabeth L. Kelly and Certificate of Counsel on the following, by mailing a copy thereof, by depositing same in the United States mail on the 9 day of December, 2014, first class postage prepaid, and addressed as follows:

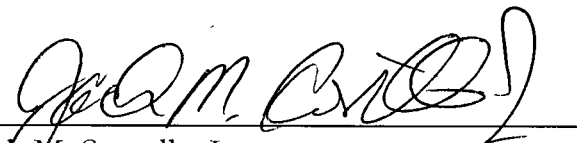
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December 8, 2014

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1205 Pendleton Street  
Columbia, SC 29201

RE Alexander Mangialardo and Audra Mangialardo vs Blue Ridge Ventures, LLC, et al.  
Appellate Case No · 2014-001104

Dear Ms Kitchings.

Please find enclosed for filing in the above-referenced case the original and one copy of the following.

- Initial Brief of Respondents Gerald W Kelly and Elizabeth L Kelly,
- Certificate of Counsel
- Proof of Service

I would appreciate your filing the original documents in your office and returning to me clocked copies. A self-addressed stamped envelope is enclosed for your use. By copy of this correspondence, I am hereby serving all counsel of record with same.

Thank you in advance for your assistance in this request.

Very truly yours,



Jack M. Scoville, Jr

JMSjr/mmw

Enclosures

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**SC Court of Appeals**

cc Michael S Chambers, Esq.  
G Turner Perrow, Esq  
Karen Sauls, Esq  
Jeffrey E Johnson, Esq  
Caison Engineering Company, Inc., c/o Albert A. Caison  
Blue Ridge Ventures, LLC, c/o Keith Duncan  
Keith Duncan  
Gerald and Elizabeth Kelly

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