IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master In Equity

Case No.: 2010-CP-10-5825

Selene RMOF REO Acquisition, LLC.....Respondent,

v.

Melissa Furmanchik; Masonborough at Park West Association, Inc.

and Wells Fargo Bank, N.A.,.....Defendants,

Of whom Melissa Furmanchik is the..... Appellant.

FINAL BRIEF OF RESPONDENT

Jason D. Wyman (SC Bar # 100271)
ROGERS TOWNSEND & THOMAS, PC
P.O. Box 100200
220 Executive Center Drive
Columbia SC 29202-3200
Telephone (803) 744-5303
Attorney for Respondent

Mary Leigh Arnold,
Mary Leigh Arnold, PA
749 Johnnie Dodds Blvd., Suite B,
Mt. Pleasant, SC 29465.
Telephone: 843-971-6053
Attorney for Appellant

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Jason D. Wyman (SC Bar # 100271)
ROGERS TOWNSEND & THOMAS, PC
P.O. Box 100200
220 Executive Center Drive
Columbia SC 29202-3200
Telephone (803) 744-5303
Attorney for Respondent

Mary Leigh Arnold,
Mary Leigh Arnold, PA
749 Johnnie Dodds Blvd., Suite B,
Mt. Pleasant, SC 29465.
Telephone: 843-971-6053
Attorney for Appellant

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STATEMENT OF THE ISSUES ON APPEAL

I. **Did the Master-in-Equity abuse his discretion by granting *sua sponte* relief?**

II. **Did the Master-in-Equity err by determining Respondent had standing to pursue foreclosure?**

III. **Did the Master-in-Equity abuse his discretion by determining Respondent's evidence was sufficient to establish foreclosure?**

IV. **Did the Master-in-Equity correctly find that Respondent was entitled to a judgment of foreclosure?**

V. **Did the Master-in-Equity abuse his discretion by awarding interest?**

STATEMENT OF THE CASE

This lawsuit arises out of the foreclosure of a real estate mortgage. On or about July 20, 2010, Wachovia Mortgage Corporation filed a foreclosure complaint.

On or about September 10, 2012, the Master-in-Equity entered an Order substituting Selene RMOF REO Acquisition, LLC as Plaintiff.

Appellant Melissa Furmanchik ("Furmanchik") initially failed to answer, plead or otherwise respond to the Complaint and was held in default. On or about September 21, 2010, Furmanchik retained counsel and filed a Motion for Leave to File out of Time Answer and Notice of Election to Participate in Foreclosure Intervention. Respondent and Furmanchik entered into a Consent Order resolving the motion. On December 2, 2010, Furmanchik filed an Answer and raised two affirmative defenses to the foreclosure: lack of standing and failure to provide notice.

Thereafter, on March 28, 2013, Furmanchik filed a Motion to Dismiss or in the alternative for Summary Judgment. In her Motion, Furmanchik argued that Plaintiff lacked standing and was not the real party in interest to maintain the foreclosure action. The Master-in-Equity denied the motion by Order entered on May 20, 2013.

Then, the Master-in-Equity held a final foreclosure trial in this matter on June 20, 2013. Following the June 20, 2013 hearing, Furmanchik filed a motion to reconsider. After reviewing Furmanchik's motion, the Master-in-Equity determined *sua sponte* that this case should be reopened for the express purpose of taking additional testimony regarding the note and subsequent modification agreement. The second hearing took place on August 12, 2013.

The Master-in-Equity entered a judgment of foreclosure and sale on February 7, 2014. Furmanchik then filed a Motion to Reconsider and Vacate the Judgment of Foreclosure and Sale on or about February 21, 2014. The Master in Equity issued a Form 4 denying Furmanchik's

February 2014 motion to reconsider. Ms. Furmanchik then timely filed this appeal.

STATEMENT OF THE FACTS

In addition to the facts set forth in the Statement of the Case, in September 2005, David H. Furmanchik, now deceased, obtained a construction loan for the purpose of constructing improvements on the Subject Property. (R. pp. 25 - 29). The loan was evidenced by an Adjustable Rate Note executed by David H. Furmanchik, dated September 7, 2005, in the principal amount of $464,000 (R. pp. 280 - 284). A Construction/Permanent Financing Addendum supplemented the Original Note (R. pp. 288 - 289). The Construction Addendum provided for payments of interest only during the construction phase and that interest would accrue on the unpaid principal balance of the Original Note "at a rate equal to the 'WSJ Prime Rate.'" (R. p. 288).

To better secure the repayment of the Loan described above, David H. Furmanchik and Melissa Furmanchik made, executed, and delivered to Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Wachovia Mortgage Corporation (MIN #100013700057266189) a certain real estate Mortgage in writing, dated September 7, 2005, covering real property in Charleston County. (R. pp. 290 - 318). The Mortgage was filed on September 19, 2005, and is of record in the Office of RMC/ROD in Book F554 at Page 170. (R. p. 318).

After completion of the construction phase, David H. Furmanchik for value received, made, executed and delivered a "Mortgage Modification Agreement Amendment to Note and Security Instrument (R. pp. 337 - 369). The Modification Agreement was dated August 31, 2006, and recorded in the Office of the RMC for Charleston County on September 11, 2006, in Book W597 at Page 260. The Modification Agreement modified certain terms of the Original

Note and Mortgage. (R. pp. 337 – 352).

Prior to the filing of the instant case, the Mortgage was assigned to Wachovia Mortgage Corporation by an assignment dated July 7, 2010, and recorded on July 15, 2010, in Book 0133 at Page 352. (R. pp. 319 – 320). The Mortgage was then assigned three times. First, Wachovia Mortgage Corporation assigned to the Mortgage to Selene Finance LP, by assignment October 7, 2010, and recorded March 18, 2011 in Book 0177 at Page 657 (R. pp. 321 – 322). Then, Selene Financial LP assigned the Mortgage to SRMOF 2009-1 Trust by assignment dated March 29, 2011, and recorded May 3, 2011, in Book 0185 at Page 205. (R. pp. 323 – 324). Finally, SRMOF 2009-1 Trust assigned the Mortgage to Selene RMOF REO Acquisition, LLC by assignment dated March 29, 2011, and recorded May 3, 2011, in Book 0185 at Page 206. (R. pp. 325 – 326)

After the execution of the Mortgage, David H. Furmanchik conveyed the subject property to David H. Furmanchik and Melissa Furmanchik, as joint tenants with the right of survivorship, by Deed dated September 13, 2005, and recorded September 19, 2005, in Deed Book D554 at Page 866. David H. Furmanchik passed away on March 3, 2008, vesting his interest in Melissa Furmanchik as the surviving joint tenant. (R. pp. 290 – 318). Subsequently thereafter, Melissa Furmanchik conveyed the subject property to Melissa Furmanchik, as Trustee of the Melissa Furmanchik Living Trust by Deed dated October 23, 2012, and recorded November 21, 2012, in Deed Book 0292 at Page 659. (R. p. 183, lines 1-7).

Payment due on the Note was not made as provided for therein, and Respondent, as the holder of the Note, elected to require immediate payment of the entire amount due thereon and placed the Note and Mortgage in the hands of its attorney to commence this foreclosure action. (R. pp. 68 - 74)

Mamie Clark, an employee of Respondent, testified at both hearings in this case. The main issue at both foreclosure hearings was the admissibility of certain exhibits and whether Selene had standing to enforce the negotiable instrument secured by the mortgage. Ms. Clark testified regarding various documents and the default under the terms of the subject note and mortgage. Her testimony is further discussed in the argument section of this brief.

Following the two hearings in this matter, the Court entered a judgment of foreclosure and sale in favor of the Respondent. Following her timely appeal, Appellant posted a bond to stop the sale of the subject property.

STANDARD OF REVIEW

This Court may affirm for any ground appearing in the record. Rule 220(c), SCAR; *see also I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

"The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." *Brenco v. S. Carolina Dep't of Transp.*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008) (citing *Wright v. Strickland*, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct.App.1991). "An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support." *Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013).

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011) (internal quotations omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* at 444, 710 S.E.2d at 58 (internal quotations omitted). Additionally, "[a] finding of abuse of discretion does not end the analysis, however, "because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Allegro, Inc. v. Scully*, 400 S.C. 33, 44, 733 S.E.2d 114, 120 (Ct. App. 2012) (quoting *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008).

ARGUMENT

I. THE MASTER IN EQUITY DID NOT ABUSE HIS DISCRETION BY REOPENING THE CASE IN ORDER TO TAKE ADDITIONAL TESTIMONY

"The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. *Brenco v. S. Carolina Dep't of Transp.*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008). "The trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case." *Spinx Oil. Co., Inc. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993) *overruled on other grounds*, *Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co.*, 326 S.C. 231, 486 S.E.2d 89 (1997).

In the present case, the Master-in-Equity, following the trial and a review of Appellant's initial Rule 59(e) motion, decided to reopen the case "for the express purpose of taking additional testimony with regards to the note and subsequent modification agreement." There is no evidence in the record to suggest that the Master in Equity abused his discretion; instead, he acted well within his "considerable latitude and discretion" to "reopen the record for additional evidence" on the note and modification agreement following the lengthy argument at the first hearing. Furthermore, Respondent cannot show prejudice as she was afforded the opportunity to cross-examine Ms. Clark during the second hearing. Finally, it appears that the Master in Equity's ruling was actually based on Rule 59(d), SCRCP. Rule 59(d) provides that the Master in Equity could have on "its own initiative" grant a new trial "for any reason it might have granted a new trial on motion of any party." The Master in Equity ruled from the bench at the first hearing but did not issue a written order. Thus, the clear implication of the July 11, 2013 Order is that the Master in Equity granted Respondent's motion to reconsider the oral ruling from the bench and ordered a new trial on certain issues.

Under these circumstances, the Master in Equity did not abuse his discretion in reopening the case.

II. THE MASTER IN EQUITY CORRECTLY FOUND THAT PLAINTIFF HAD STANDING TO FORECLOSE ON THE MORTGAGE

Standing refers to a "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Black's Law Dictionary* 1536 (9th ed. 2009). Generally, to have standing, a party must be a real party in interest to the litigation. *Evins v. Richland County Historic Pres. Comm'n,* 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (citing *Glaze v. Grooms,* 324 S.C. 249, 478 S.E.2d 841 (1996)). A real party in interest is a party with "a real, material, or substantial interest in the outcome of the litigation." *Baird v. Charleston County,* 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). In South Carolina, standing is composed of three elements.

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Smiley v. South Carolina Dep't of Health & Envt'l Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32–33 (2007) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992)). The elements of standing, however, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stage of the litigation." *Beaufort Cnty. v. Trask,* 349 S.C. 522, 528 n. 14, 563 S.E.2d 660, 663 n. 14 (Ct.App.2002) (quoting *Lujan,* 504 U.S. at 561). Finally, in the context of a mortgage foreclosure action, this Court recently held that "[a] servicer

is a party in interest and has standing to move for relief from stay and to file proofs of claim on the owner's behalf." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (quoting *In re McFadden,* 471 B.R. 136, 176 (Bankr. D.S.C.2012)).

In the present case, Wachovia Mortgage Corporation had standing at the time it filed the instant lawsuit. First, it suffered an "injury in fact" based on the alleged default under the terms of the Note and Mortgage. Second, "causal connection" between the alleged injury is "fairly traceable" to the alleged default under the terms of the Note and Mortgage. Finally, the third element is satisfied since it is likely that the "injury in fact" will be "redressed" by a judgment of foreclosure and sale. Moreover, Respondent has standing and is the real party in interest to continue prosecuting this mortgage foreclosure action. There is no dispute that Respondent is the current servicer of the loan. Based on this Court's holding in *Draper*, the Master in Equity correctly found that Respondent had standing to foreclose on the mortgage.

III. THE MASTER IN EQUITY DID NOT ABUSE HIS DISCRETION BY DETERMINING THAT RESPONDENT'S EVIDENCE WAS SUFFICIENT TO ESTABLISH THE NECESSARY ELEMENTS FOR FORECLOSURE OF THE MORTGAGE

"Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt." *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009) (citing *Franklin Credit Mgmt. Corp. v. Nicholas,* 812 A.2d 51, 57–58 (2002) ("In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note."); *Campaign v. Barba,* 23 A.D.3d 327 (N.Y. App. Div. 2005) ("To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment."); *In re Foreclosure of*

Real Prop. for $143,600.00, 577 S.E.2d 398, 406 (N.C. Ct. App. 2003) ("In a foreclosure proceeding, the lender bears the burden of proving that there was a valid debt, default, right to foreclose under power of sale, and notice."); 55 Am. Jur. 2d *Mortgages* § 604 ("[T]he burden of proof of any particular issue rests upon the party asserting the affirmative of that issue under the pleadings.")).

A. The Master in Equity correctly concluded that Ms. Clark was a qualified witness.

Ms. Mamie Clark appeared at both hearings and testified on behalf of the Plaintiff. Ms. Clark testified that she worked for Selene Finance, L.P. which serves as the servicer for the Plaintiff. (R. p. 184, lines 19-23). She is employed as a contested default manager. One of her job duties is to appear at the trials and provide testimony. (R. p. 256, lines 21-23). Further, she testified that she was familiar with the records maintained for the loan at issue. She further testified that the loan was service transferred to Selene from Wells Fargo and that she was familiar with how loans and the accompanying documentation was transferred. (R. p. 193, lines 12-14). She further explained what a service transfer was and what occurred during the service transfer of this loan. (R. p. 257, lines 22-25). She further testified that loan document and records for the subject loan were kept and maintained in the ordinary course of business. (R. p. 258, lines 10-11).

In the present case, the Master correctly concluded that Ms. Clark was sufficiently familiar with the record keeping system for Selene. This is all that is required under the business record exception. *See Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F.Supp. 1304, 1311 (D.S.C. 1994). There is nothing in record to support the conclusion that the Master in Equity abused his discretion in making this evidentiary conclusion.

B. The Note, Mortgage and Modification were properly admitted in to evidence.

At multiple hearings in this case, the Master in Equity reviewed the Original Note and a copy of the recorded Mortgage and Modification Agreement. The Master in Equity noted the Original Note contained an Allonge for the purpose of endorsement. As to the Mortgage, Ms. Clark testified to its recording in the public records. Finally, the Modification Agreement was also recorded in the public record. Ms. Clark testified to the key terms of the Modification. The Court correctly concluded that the Note, Mortgage and Modification were not hearsay. While South Carolina has not ruled on this issue, the court's opinion in *Bank of America, NA v. Neis*, 349 Wis. 2d 461, 835 N.W.2d 527 (Ct. App. 2013) is instructive. There, the Wisconsin Court of Appeals addressed the admissibility of various documents in a mortgage foreclosure action. The court concluded that the note and mortgage attached to the summary judgment affidavit were not hearsay and found that the note and mortgage was "offered only for their legal effect." *Neis*, 349 Wis. 2d at 490, 835 N.W.2d at 541.

In the present case, the Master in Equity correctly found that the Note, Mortgage and Modification are admissible and Respondent has failed to show an abuse of discretion.

C. Assignments of Mortgage were properly admitted into evidence.

The Master in Equity correctly found that the four assignments of mortgages were admissible. He correctly concluded that the publicly recorded assignments of mortgage were self-authenticating documents in the fact that they were recorded in the public records and Ms. Clark testified to the recording dates and book and page numbers.

D. The Payment History, Demand Letter, and Judgment Figures were properly admitted in to evidence under the business records exception to the hearsay rule.

It is undisputed that Wells Fargo, the prior servicer of the loan, records were used to generate the Payment History, Demand Letter and Judgment Figures. Appellant incorrectly

argues that Respondent's witness could not authenticate the prior servicer's business records and that such evidence is inadmissible. Respondent argued that the documents were admissible as business records. The Master in Equity correctly found that the Demand Letter, Payment History and Judgment Figures are admissible under S.C. Code Ann. § 19-5-510 and Rule 803(6), SCRE. As succinctly stated by Judge Duncan in *In re McFadden*, 471 B.R. 136 (Bankr. D.S.C. 2012), "*Midfirst Bank* makes clear that for documents to be admissible under the business records exception, they do not have to be actually created by the witness testifying to authenticate them, as Trustee's counsel appears to argue, nor do they even have to be created by the entity by which the witness is employed." *In re McFadden*, 471 B.R. at 160. The Master in Equity's decision was further supported by *Twelfth RMA Partners, L.P. v. National Safe Corporation*, 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999). In *Twelfth RMA Partners, LP*, the Court of Appeals held that the master in equity did not err by allowing the testimony of the plaintiff's witness despite the fact that the records were generated by a previous entity. *Twelfth RMA Partners, L.P.*, 335 S.C at 642, 518 S.E.2d at 48.

For the foregoing reasons, the Master in Equity did not abuse his discretion and his decisions on the admissibility of evidence in this case should be affirmed.

IV. THE MASTER IN EQUITY CORRECTLY FOUND THAT RESPONDENT WAS ENTITLED TO A JUDGMENT OF FORECLOSURE

As stated above, "[g]enerally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt." *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009).

A. Respondent's possession of the original note makes it a person entitled to enforce the negotiable instrument and established the existence of the debt

The Master in Equity correctly found that Respondent had the legal right to enforce the negotiable instrument secured by the Mortgage and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. At the trial, Plaintiff's counsel produced the Original Note. After close examination of the Original Note, the Court finds the original payee was Wachovia Mortgage Corporation. The Original Note was then properly endorsed to Wachovia Bank, N.A. Next, Wells Fargo as Successor by Merger to Wachovia Bank, N.A., through an allonge, endorsed the Original Note in blank. Plaintiff, through its attorneys, is in possession of the Original Note, which is endorsed in blank, it is the holder of the Note. S.C. Code Ann. §36-1-201 (1976). The holder of the Note is entitled to enforce it. S.C. Code Ann. §36-3-301; *see also Schnieder v. Deutsche Bank National Trust Company*, 572 Fed. Appx. 185 (4th Cir. 2014) (unpublished) (applying South Carolina law).

Appellant argues that the allonge was not properly "affixed" to the Original Note. "While the Code requires that an allonge be "affixed" to a note in order for the signature on the allonge to be an indorsement on the note, it is clear from the Official Comments that the "no space" test does not apply in South Carolina." *In re McFadden*, 417 B.R. 136, 173 (Bankr. D.S.C. 2012). Further, Appellant incorrectly argues that the Note must have been specifically indorsed to Respondent in order for Respondent to have standing. This is a misstatement of the law and ignores the well-established case law regarding bearer paper. In the present case, the Note was endorsed in blank and thus became bearer paper.

Appellant further argues that "Note 2" was required to be indorsed in order to confer standing on Respondent. This, again, is incorrect. "Note 2" was actually part of a "Mortgage Modification Agreement Amendment to Note and Security Instrument." Paragraph 2 of the

"Mortgage Modification Agreement Amendment to Note and Security Instrument," provides that the terms of the original Note ("Note 1") "are amended and modified in accordance with the terms and provisions of Exhibit 'A'" attached the modification. This language sufficiently incorporates the modification and its terms into the Note.

Importantly, Appellant does not challenge the accuracy of the amount of the debt. For the foregoing reasons, Respondent sufficiently established the existence of the debt and the Master in Equity's decision should be affirmed.

B. Respondent established the default on the debt

Ms. Clark's testimony sufficiently established that the loan was past due and was in default. (R. p. 206, line 24 – p. 207, line 1). Further, the Complaint alleged that the loan was in default and due for the December 2009 payment. Appellant has not put forth any argument to the contrary.

V. THE MASTER IN EQUITY CORRECTLY FOUND THAT INTEREST WAS PROVIDED FOR UNDER THE TERMS OF THE NOTE AND MORTGAGE

Appellant incorrectly states that that the Note provided for "zero interest." The original loan was evidenced by an Adjustable Rate Note executed by David H. Furmanchik, dated September 7, 2005, in the principal amount of $464,000. A Construction/Permanent Financing Addendum supplemented the Note. The Construction Addendum provided for payments of interest only during the construction phase and that interest would accrue on the unpaid principal balance of the Original Note "at a rate equal to the 'WSJ Prime Rate.'" Appellant's argument to the contrary is completely without merit.

CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, Respondent respectfully requests that the Court affirm the Master's Order entered on February 3, 2014.

Respectfully submitted,

Jason D. Wyman (SC Bar # 100271)
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive – Suite 109 (29210)
P.O. Box 100200
Columbia SC 29202-3200
Telephone (803) 744-5303
Attorneys for Respondent

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent** on Appellant by depositing a copy in the United States Mail, postage prepaid, on January 2, 2015, addressed to Appellant's attorney Mary Leigh Arnold, Esquire, 749 Johnnie Dodds Blvd., Suite B, Mt. Pleasant, SC 29465.

Jason D. Wyman (SC Bar # 100271)
Rogers Townsend & Thomas PC
220 Executive Center Drive – Suite 109 (29210)
P.O. Box 100200
Columbia SC 29202-3200
Telephone (803) 744-1305
Attorneys for Respondent