

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-2861
Appellate Case No. 2014-002047

Phyllis Hufton,
..... Respondent,

v.

Flagstar Bank, FSB and John Doe,
..... Defendants

of whom

Flagstar Bank FSB is
..... Appellant

APPELLANT'S INITIAL REPLY BRIEF

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SC Court of Appeals

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INTRODUCTION

This appeal presents the question of whether a party who is

1. named in a foreclosure action (ROA Item 6);
2. is personally served (ROA Item 7 and 8);
3. represented by counsel (ROA Item 7 and 9; *see* MSJ Ex. 7);
4. offers to quitclaim by a deed in lieu of foreclosure her interest (ROA MSJ Ex.2);
5. file an answer admitting all the allegations of the foreclosure complaint (ROA Item 9);
6. fails to attend the foreclosure hearing (ROA Item 1, p. __);
7. served with the foreclosure judgment (ROA Item 7 and 8); and
8. fails to appeal the foreclosure judgment¹

can file a separate action to quiet title action (ROA Item 11), six months after the sale was final and the master's deed was issued and recorded, claiming an individual interest survived the foreclosure because she was allegedly named in only one capacity in the long-concluded foreclosure action. *Id.*

For the reasons discussed in Flagstar's Brief and herein, the answer is emphatically no, and this court should reverse the orders of the circuit court to the contrary and grant Flagstar summary judgment on its earlier motion.

REPLY TO FACTS

Flagstar asserts its statement of the facts as alleged in its Appellate brief. The following are clarifications or response to the facts as alleged and misinterpreted by Hufton in its brief². Only James C. Hufton executed the note which was subsequently assigned to

¹ As set forth herein, the foreclosure judgment decreed that all parties and persons claiming under them were forever barred and foreclosed.

² Flagstar notes that Respondent's Initial Respondent's Brief was not timely filed or served. On December 19, 2014, Respondent requested a 30-day extension of time to file initial brief and designations, to which Flagstar consented. Respondent's letter inaccurately calculated the new date for filing and service would be January 30, 2015. This Court granted the request by order filed January 8, 2015, but correctly pointed out

Flagstar. (ROA Item 13; Item 28). Both James C. Hufton and Elmer C. Craft executed a purchase money mortgage on the property which was properly assigned to Flagstar and then subsequently foreclosed. (ROA Item 28). The property was titled in both names. (ROA Item 13 MSJ Ex. A). Mr. Hufton and Mr. Craft are both deceased and the mortgage debt owed to Flagstar exceeded by over \$100,000 the market value of the mortgaged property. (ROA Items 1, 12). Nevertheless, Flagstar waived its right to a deficiency judgment against the Hufton Estate and did not seek to re-open that estate. (ROA Item 6). The Estates of Hufton and Craft were named as parties to the foreclosure proceeding along with their respective Personal Representatives and respective legal heirs. *Id.* Everyone's interest coming out of the Hufton and Craft Estates was foreclosed. (ROA Item 1, Judgment of Foreclosure).

It is not accurate for Respondent's brief to state that Hufton "purchased" a deed from the Estate of Elmer Craft³. (Respondent's Initial Brief, unnumbered Page 6 (counting the cover)). Rather as recited in the defective quitclaim deed from the Craft Estate into Hufton, the transfer was part of a previously negotiated settlement agreement between the Estates of James C. Hufton and Elmer Craft (hereinafter "Craft Estate"). (ROA Item 31). James C. Hufton had died before this conveyance was made, and it was executed on behalf of his estate by Deborah A. Oehlschlaeger, as the personal representative of the Craft estate.

that the new deadline for filing and service of the initial respondent's brief and designations was January 28, 2015. Respondent served the initial Respondent's Brief and Designations on Flagstar on January 29, 2015, not January 28, 2015. (See copy of envelope of service, attached hereto and incorporated by reference, evidencing a postmark date of January 29, 2015).

³ The pages of Hufton's initial brief are unnumbered, making the Table of Contents and Table of Authorities noncompliant.

Id. She, in her capacity as P.R. for the Estate, had been named and served in the foreclosure action (ROA Item 1).

The significance of the quitclaim deed from the Craft Estate to Phyllis Hufton is that the individual interest purportedly derived therefrom is the sole remaining basis on which Hufton claims to have survived Flagstar's foreclosure on the subject property. Hufton cannot escape the dispositive fact that Deborah A. Oehlschlaeger was personally named and served in the foreclosure action on behalf of the Craft Estate, as was the sole legal heir of that estate, Nancy Craft. (ROA Item 6, 1). Through her answer, filed by her counsel, Hufton admitted that all parties named⁴ and all persons claiming under *them*, (i.e., the parties named in the foreclosure action) be forever foreclosed and barred of all rights, title and interests in the property which secured Flagstar's mortgage. This is the relief granted by Judge Stroman (ROA Item 1, ¶ 16). *Res judicata* clearly bars Hufton's claim accordingly.

Flagstar likewise disagrees with Hufton's statement that she was not named individually in the foreclosure action. By naming her as James C. Hufton's legal heir and by virtue of any interest she had under James C. Hufton's will, Hufton was named individually. Flagstar also disagrees that Hufton answered the foreclosure complaint in limited capacities. The caption of Hufton's Answer specifically states, "Answer of Phyllis C. Hufton". (ROA Item 9). Several emails by Hufton's counsel refer to his client (in the

⁴ The named defendants in the foreclosure action included the following: Phyllis C. Hufton, as Personal Representative and Legal Heir of the Estate of James W. Hufton, Sr., Deceased, James W. Hufton, Jr., as Legal Heir of the Estate of James W. Hufton, Sr., Deceased, Marcee L. Cook, as Legal Heir of the Estate of James W. Hufton, Sr., Deceased, Sharie Ann Carey, as Legal Heir of the Estate of James W. Hufton, Sr., Deceased, Deborah A. Oehlschlaeger, as Personal Representative of the Estate of Elmer Judson Craft, Jr., a/k/a Elmer J. Craft, Jr., a/k/a Elmer J. Craft, Deceased, Nancy Phillips Craft a/k/a Nancy P. Craft a/k/a Nancy Craft, as Legal Heir of the Estate of Elmer Judson Craft, Jr., a/k/a Elmer J. Craft, Jr., a/k/a Elmer J. Craft, Deceased, and Bahama Sands Homeowners' Association, Inc. (ROA Item 1).

singular) as Phyllis Hufton, and not as PR Hufton or legal heir Hufton or deeded owner Hufton. (ROA Item 33). Hufton even offered to give Flagstar a deed in lieu of foreclosure which is corroborating and consistent with her answer admitting all of the material allegations of the foreclosure complaint. (ROA MSJ Ex. 2). Indeed, in a March 08, 2012 email, Hufton's counsel notes that he has answered the complaint and that "my client" (again in the singular) wants to now turn over all the rents immediately to Flagstar. (ROA Item 13, MSJ Ex. F).

Finally, Flagstar emphatically disagrees with Hufton's characterization that she *first* learned of any alleged defect in the foreclosure lawsuit by correspondence from Brad Jones, a North Carolina lawyer. First, Flagstar asserts there is not a defect in the judicial foreclosure lawsuit, which would have been apparent factually and legally from the Order of Foreclosure issued by Judge Stroman. Second, all the facts which Hufton now contends entitle her to relief were known to her and her lawyer when she filed an answer admitting all of the allegations of the foreclosure complaint.

REPLY TO ARGUMENTS

1. HUFTON WAS NAMED, SERVED AND ANSWERED IN AN INDIVIDUAL CAPACITY.

The central tenet to Hufton's arguments is that she was not named or served *individually*. To support this argument, Hufton ignores that she was named and served as a Legal Heir of the Estate of James W. Hufton, Sr. ... and by virtue of any interest claimed under the law of succession (S.C. Code § 62-2-109) or under decedent's will." This is in an *individual* capacity and not a *representative* capacity.

While it is true that Flagstar did not include allegations of a book and page of the quitclaim deed to Hufton in the foreclosure action complaint, it is not, as misstated by Hufton, in any form a source of support for her allegations. To the contrary, this “failure” was intended to, and had the effect of, precluding such interests as the one now claimed by Hufton.

The naming the Craft Estate, its P.R. and heirs cast a broader title clearance net that was necessary to foreclosure a broader range of actual or potential interests (including the interest Hufton now claims via the quitclaim deed from that estate). Reference to a contested and questionable deed with highly specific book and page listed would only have limited the relief afforded via the Judgment of Foreclosure order. Flagstar asserts the quitclaim was deficient on its face as discussed. But regardless, it is the very breadth afforded by specific naming of all potential parties (and not limiting to book/page references to a defective deed) and all possible derivative interests therefrom, that further dooms the claims of Hufton. It is the legal and equitable outcome Flagstar requested in its foreclosure complaint, admitted in full by Hufton, and the relief ordered by the Judgment of Foreclosure. (ROA Item 1).

Flagstar was not (as Hufton argues) abandoning Flagstar’s assertion that Hufton was named in an individual capacity as “Legal Heir of the Estate of James W. Hufton, Sr. ... and by virtue of any interest claimed under the law of succession (S.C. Code § 62-2-109) or under decedent’s will” which is what Flagstar argues in Appellant’s brief. This consistent position is evident in Flagstar’s motion for summary judgment authored by the same counsel quoted by Hufton who states, “The Foreclosure Complaint stated that Flagstar was seeking foreclosure on the entire Property. (*Id.* at ¶ 7.) It also named every

person, *including Plaintiff* that was a legal heir or representative of both Mr. Hufton and Mr. Craft's estates. (*Id.* at ¶15.) (ROA) (*emphasis added*). This is also a position that Hufton's counsel accepted and admitted prior to filing the present suit for quiet title. Hufton's attorney represented to Flagstar in an email dated February 23, 2012 that "I represent Phyllis C. Hufton and the *rest* of the known parties *named as Defendants.*" (Emphasis added.) (ROA Item 15 (Exhibit F, page 3)).

This court should conclude that Hufton was named as an individual Defendant in the foreclosure lawsuit. Further, that broader "title clearance" provisions of the Flagstar Complaint for foreclosure, which rightfully avoided limitation via reference to a statutorily-defective deed from the Craft Estate, addressed and now preclude Hufton's claims regardless of whether she was named as an *individual* defendant previously, and regardless of source or capacity through which she claims an interest.

Hufton was properly served individually with the foreclosure lawsuit. (ROA Item 7). Hufton's attorney represented to Flagstar in an email dated February 23, 2012 that "I represent Phyllis C. Hufton and the rest of the known parties named as Defendants...and receipt by me constitutes personal service on Phyllis Hufton..."(without qualification) (emphasis added). (ROA Item 33). Later the same day, Hufton's counsel states in another email, "I'll accept service for Phyllis C. Hufton. Please don't attempt to serve her personally."⁵ (emphasis added) Then the following day, February 24, 2012, Hufton's counsel executed an "Acknowledgment of Service " as "Attorney for Phyllis C. Hufton"

⁵ Such emails along with other correspondence by Hufton's counsel constitute a voluntary appearance even if he did not subsequently sign an Acknowledgment of Service (although he in fact did). *See Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 644 S.E.2d 793 (2007)(discussing voluntary appearance and holding an attorney letter a voluntary appearance even without stating "appearance")(citing *Petty v. Weyerhaeuser Company*, 272 S.C. 282, 251 S.E.2d 735 (1979).

and delivered it almost 2 weeks later to Flagstar's foreclosure counsel by mail on March 9, 2012. (ROA, Item 7). Rule 4(j) SCRCF provides in relevant part, "No other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served *or his attorney*, and *delivered* to the person making service." It is undisputed that Hufton's counsel signed the Acknowledgement for Phyllis C. Hufton, the individual, and delivered it to Flagstar's foreclosure counsel.

The Acknowledgment of Service apparently was not filed with the clerk of court, presumably because Hufton was personally served by an out of state process server before Flagstar received the Acknowledgment; however, "Failure to make proof of service does not affect the validity of the service." Rule 4(g) SCRCF. *Beckham v. Durant*, 300 S.C. 329, 333, 387 S.E.2d 701, 704 (Ct.App.1989) (Nowhere does the rule provide failure to file proof of service within the ten day period nullifies the service or extends the period of time for a defendant to answer.)

Hufton excoriates Flagstar in a footnote for "ignoring Respondent's courtesy" and using the "mere extension of a courtesy as a weapon." However, the record reflects that Hufton was personally served by the process server the day after Hufton's counsel communicated his request at 4:42 p.m. and the same day he signed the Acknowledgment of Service. (ROA Item 8, 13 (Exhibit 5)). Hufton was simply served before Flagstar could call off its process server. As for using the courtesy as a weapon, Flagstar is forced to do so because Hufton now claims she was not personally served.

Moreover, even if the foregoing were not sufficient to establish personal service over Hufton individually (which it is), her voluntary appearance by filing an answer as a legal heir was the equivalent of personal service under Rule 4(d) SCRCF.

2. **THE EQUITY COURT HAD JURISDICITON OVER HUFTON AND HER PROPERTY.**

A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920) (“The purpose of the summons is to acquire jurisdiction of the person of the defendant...”). As previously argued *supra* and in Flagstar’s brief, Hufton was personally served, filed an answer and her attorney made an appearance and signed an Acknowledgment of Service. The requirements of Rule 4, therefore, were satisfied. The court acquired personal jurisdiction over Hufton and she had notice of the action. Having obtained personal jurisdiction over Hufton, it was then proper for the Master-in-Equity to foreclose her equity of redemption and sell the property.

Hufton cites cases in her brief that have nothing to do with the court acquiring personal jurisdiction. Moreover, Hufton mistakenly argues that Flagstar had to serve her multiple times for each possible interest despite the representations of her attorney that he “represent[s] Phyllis Hufton and the rest of the known parties as Defendants...and receipt by me constitutes personal service on Phyllis Hufton...” (ROA Item 33) (emphasis added). Rule 4(a) SCRPC speaks to service of each Defendant, not each Defendant’s interest. As noted *supra*, the Craft Estate, its Personal Representative and its heir were all named and served as parties to the foreclosure action so their interest and that of any persons claiming under the Craft Estate were foreclosed. (ROA Items 1, 6).

3. **AFTER BEING SERVED AND MAKING AN APPEARANCE IT WAS INCUMBENT UPON HUFTON TO RAISE ANY AFFIRMATIVE DEFENSES IN HER ANSWER.**

The South Carolina Rules of Civil Procedure eliminated the “special appearance” means of challenging jurisdiction and instead requires and mandates that the affirmative defenses of lack of jurisdiction over the person and insufficiency of service of process to be raised by motion or included in the responsive pleadings or the defenses are waived. Rule 12(h)(1) SCRPC.

Also, Hufton had a clear obligation under Rule 9(a), SCRPC, to raise any issues about capacity by specific negative averment in her answer to the foreclosure action. The reasons for such a rule are to avoid the kinds of specious issues that Hufton now raises in this action. Hufton claims that this rule is not applicable to her although much of her brief is devoted to arguing that she was not served in an individual capacity. In essence, Hufton argues that service in her capacity as personal representative and as a legal heir does not obligate her to raise the issue of whether the court has jurisdiction over her individually or over the purported quitclaim deed interest from the Craft Estate. The argument is nonsensical given neither the Craft estate nor its personal representative contested the underlying foreclosure, the legal conclusion of which completely foreclosed any interest by Hufton claiming through the Craft estate. (ROA Item 1).

Under Rule 12(h)(3), “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” If Hufton believes so strongly that the court lacked jurisdiction over her or her property, then she had a duty to raise the issue in her answer, appear and contest the issue at a hearing, or appeal the Master’s Judgment of Foreclosure. Instead, she admitted all the

allegations of the complaint, including those as to both herself and the Craft Estate, its Personal Representative and its Heir, and failed to appear at the duly-noticed hearing.

4. HUFTON FAILS TO DISTINGUISH THE ‘MISNOMER’ CASES.

Hufton’s brief pays little attention to the line of cases which hold that a party sued in the wrong name, but who has notice of the proceedings and allows the Plaintiff to continue to judgment without complaint, will not be able to set the proceedings aside and will instead be bound by that judgment. *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 399 S.E.2d 779 (1990); *Waldrop v. Leonard*, 22 S.C. 118 (1885) (holding that an individual incorrectly named in complaint could not avoid default judgment because he failed to inform the court of the error before judgment was entered.) Hufton merely states that “this is not a case of mistaken name or wrong name but excluding a name and person completely.” (Respondents Initial Brief, unnumbered page __)

If anything, however, this case is a much stronger case for application of this precedent. Contrary to Hufton’s contentions, her name was included in the caption and in the complaint. Foreclosure counsel also named the Craft Estate, its Personal Representative and its heir in the complaint. Hufton’s arguments are based entirely on purportedly being sued in a wrong capacity while admitting that she was sued in at least two capacities. There are strong public and judicial policy reasons why a person allegedly sued in the wrong capacity should not be treated differently than a party sued in the wrong name, when in both cases the party with knowledge of the error fails to complain and ignores its mandated duty to raise the issue with the court before judgment is rendered.

5. JUDGE STROMAN'S ORDER SHOULD BE ENFORCED AS THE LAW OF THE CASE.

Under the law of the case doctrine, a party is precluded from relitigating matters that should have been raised on appeal but were not, or those that were raised on appeal, but were expressly rejected by the appellate court. *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding an unappealed ruling, right or wrong, is the law of the case). Hufton attempts to avoid application of this doctrine by claiming she was not served (*contra* ROA Item 8) and was not a party so that the judgment of foreclosure does not apply to her, or only applies to her in certain representative capacities, but not others.

Hufton also seeks to ignore her dispositive admissions that the Craft Estate, its Personal Representative and its Heir were all correctly named in the foreclosure action. (ROA Items 1, 6). As explained *supra* in Argument Section 1, Hufton's argument that the book and page for the statutorily defective and otherwise void quitclaim deed should have been referenced is also erroneous, as Flagstar correctly received an order forever barring and foreclosing "all right, title and interest and equity of redemption" against all defendants named in the foreclosure. (ROA Item 1, ¶ 16).

For the reasons previously argued herein and in Appellant's brief, Hufton was named, Hufton was personally served and again through acceptance of service by her counsel, Hufton and her counsel made a voluntary appearance and Hufton answered the complaint. Hufton was a party to the foreclosure action, as was the Craft Estate, and neither of them appealed Judge Stroman's Order and Judgment of Foreclosure and Sale. That Order, therefore, is the law of the case and should have been applied by the circuit court in

this action. Being the law of the case, the circuit court was required to accept the “Conclusions of Law” by Judge Stroman. Judge Stroman specifically found, in Paragraphs 16, 23 and 24 of the “Conclusions of Law” sections, as follows:

(16) And it is further ORDERED, ADJUDGED AND DECREED that Defendant[s] named herein and all persons whosoever claiming under him, them, or it, be foreclosure barred and foreclosure of all right, title and interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

...

(23) No Defendant raised any issues related to Plaintiff’s standing to prosecute this action. Therefore, any issues related to Plaintiff’s standing or ability to prosecute this action are waived.

...

(24) Defendant Phyllis C. Hufton has not established any claims for relief against the Plaintiff, and therefore, no relief should be granted to the Defendant;

(ROA Item 1, emphasis added.))

This court should hold that Judge Stroman’s Order is the law of the case and it should have been considered and enforced by the circuit court judge as to Hufton in her individual capacity as well as through her purported quitclaim interest received from the Craft Estate. (ROA Item 1, ¶ 16).

It is the well-established public policy of this state to give favor to and uphold the finality of judicial sales when regularly made and when it can be done without doing other injustice. *Wingard v. Hennessee*, 206 S.C. 159, 33 S.E.2d 390 (1945); *Wooten v. Seanch*, 187 S.C. 219, 196 S.E. 877 (1934); *In re: Creech*, 112 S.C. 205, 99 S.E. 828 (1919). Accepting Hufton’s arguments would violate every canon of equity and result in a windfall to Hufton where she receives real property for which she gave no consideration as an award

for manipulating the process of the judicial sale process and foreclosure. Judge Stroman's Order was written and filed to avoid this type of miscarriage of equity and law.

6. ARGUMENTS UNDER SECTION III OF APPELLANT'S BRIEF ARE FULLY PRESERVED FOR REVIEW.

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 529 S.E.2d 543, 339 S.C. 406 (2000). Generally, a party "cannot raise an issue for the first time in a Rule 59(e), SCRPC motion which could have been raised at trial." *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003). However, error preservation rules are not inflexible and rigid, but serve an efficiency purpose. Error preservation requirements are imposed "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

A. Virginia statutory argument fully and properly considered by lower court.

Flagstar's first argument in Section III of Appellant's Brief is that Hufton's remaining source of her claimed interest in the property, the quitclaim deed from a representative of the Craft Estate, was per se defective and insufficient to pass any actionable interest to Hufton. (App. Br. p. 15). Flagstar acknowledges that it raised this issue expressly for the first time as part of its Rule 59(e) motion. (ROA Item 18). The quitclaim deed had been before the lower court, however, as an attachment to Flagstar's Motion for Summary Judgment and memorandum in opposition to Respondent's motion for summary judgment. (ROA Items 13, Supp. Des. 1). As such, the court could have

realized the quitclaim deed in question was defective on its face, as portions of the deed remained incomplete. *Id.* Further, after the argument was raised in the Rule 59(e) motion, Hufton had the opportunity to address that argument with all the relevant law, facts and argument she desired as part of her memorandum in opposition to that motion. That opportunity was more than sufficient, given that this matter was resolved on a motion for summary judgment, not at trial before a factfinder. Accordingly, the lower court was able to consider the argument and rule “after it had considered all relevant facts, law, and arguments,” as required by *I’On*.

B. Hufton is barred from claiming an interest as a successor to an interest that was extinguished in the foreclosure action.

Although the header for Argument Section III of Appellant’s Brief mentions only the Virginia statute issue, the actual argument presented addressed another issue that is also preserved for review. That second portion of that argument discussed Hufton’s claimed interest as being solely derivative of an interest previously held by the Estate of Elmer J. Craft. (App. Br. p. 15). As pointed out in the initial brief, the Craft’s Estate was expressly identified as a defendant in the underlying foreclosure action and was listed in paragraph 18(d) of the Judgment of Foreclosure. (ROA Item 1). The nature and extent of the binding effect of that foreclosure order is of critical importance, and that order addressed extensively in the lower court and in briefing before the Court of Appeals (See App. Br. Sections I, II, IV). Accordingly, Flagstar’s arguments related to this argument presented in Section III of its initial brief is preserved for review and consideration by this Court.

7. FAILURE TO GRANT SUMMARY JUDGMENT IN FAVOR OF FLAGSTAR IS APPROPRIATE FOR CONSIDERATION ON APPEAL AND IMMEDIATELY APPEALABLE.

Flagstar moved for summary judgment, alleging that it was entitled to judgment as a matter of law on two issues: complete preclusion of Phyllis Hufton's interests in the property that was the subject of the completed foreclosure action, and Flagstar's legal right to foreclose on the property a second time even if some interest of Hufton's survived the initial foreclosure. (ROA Item 13). Flagstar's motion was denied by the lower court via a form order. (ROA Item 3).

The first of those issue is addressed in this appeal within the context of errors attendant to the grant of summary judgment in favor of Hufton. The second issue remains an error on the part of the lower court and the subject of Flagstar's argument from its Appellant's Brief (see Argument Section V of App. Br. p. 17). Hufton's response to the second issue was to cite the general rule that a "denial of a motion for summary judgment before trial is not reviewable after a trial of a case on its merits." *See Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 491 (Ct.App. 1990). Here, the issue is a matter of law, however, that will not be affected by any subsequent factual development. As a result, the matters raised by Flagstar regarding the denial of its Motion for Summary Judgment are now appropriate for immediate review on its own. Further, the same arguments were raised in the memorandum submitted in opposition to Hufton's motion for summary judgment, and thus are preserved for review as part of the review the grant of that motion, which certainly Hufton agrees is appropriate for review.

The general prohibition on appealability of denials of summary judgment is an efficiency control, since normally a denial of summary judgment would merely allow the

matter to proceed to trial, after which an appeal could be had on a more complete and detailed record. In essence, the legal standard is “we can get to that, and with more context to consider, later.” Here, however, Flagstar has received an order definitively rejecting its claimed legal right to initiate a separate legal action to foreclose on the property a second time which is premised on legal authority, not specific factual circumstances that will be subject to further clarification. The appeal as a whole is proper because it addresses the grant of summary judgment for Respondent. An order not otherwise immediately appealable will nonetheless be considered if there is an appealable issue before the appellate court, and a ruling on appeal will avoid unnecessary litigation. *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998). Unnecessary litigation is exactly what may be avoided if the legal, not factual, issue of whether Flagstar may simply resolve this dispute by foreclosing on the property a second time is addressed now instead of later.

8. HUFTON’S ARGUMENT THAT THE FORECLOSURE PROCEEDINGS ARE NOT *RES JUDICATA* IS WITHOUT MERIT.

Despite the detailed and unappealed record in this case, Hufton amazingly argues to this court, “...she’s had no opportunity to litigate any issues or causes of action until her declaratory judgment action and *res judicata* does not apply.” (Respondent’s Initial brief, unnumbered p __.) Hufton had ample opportunity to raise and litigate any issues related to her purported interest in the property. As the record shows, she had full knowledge of the same facts alleged in her declaratory judgment action before she made an appearance and answered all of the allegations of the foreclosure complaint. When she answered the foreclosure complaint, she knew the foreclosure action named the Craft Estate, its Personal

Representative and its Heir from whom she now shamelessly claims an unencumbered interest in the property.

Huften concedes the first two elements of *res judicata* are satisfied here (a prior adjudication and identity of the subject matter) but incorrectly denies that the parties are identical. For the reasons previously argued Huften was a party to the foreclosure action in both her individual capacity and via any purported interest received from the defective quitclaim deed attempted by the named defendant Craft Estate, and is therefore bound by the foreclosure proceedings and Judge Stroman's Order. (ROA Item 1, 16, 23, and 24.)

Huften ironically claims as "patently absurd" Flagstar's assertion that it was without notice of Huften's claims prior to its purchase. However, the court need only consider again the record prior to Flagstar's purchase: Huften's counsel had offered in writing to give Flagstar a deed in lieu of foreclosure, acknowledged service of Phyllis C. Huften, and then filed an answer admitting all the allegations of the complaint. (ROA MSJ Ex.2). Huften, nor her counsel attended the foreclosure hearing. They did not appeal the judgment of foreclosure. They did not attend the sale. Six months after the deed was issued to Flagstar and the matter well resolved, Huften filed her declaratory judgment action raising these purported title issues for the first time. Flagstar's claim that it was without notice is clearly correct and understandable.

Pursuant to S.C. Code Ann. § 15-39-870, this court should find that Huften's claims are further barred, be they individual or derivative, through the properly named Craft Estate which party again did not contest in any manner their naming and being bound by the Order of Judge Stroman. Moreover, the Court has ruled previously on a matter with much less favorable factors than Huften. *See Robinson v. Estate of Harris* 378 S.C. 140, 662 S.E.2d

420 (Ct. App. 2008) *aff'd*, 390 S.C. 272, 701 S.E.2d 740 (2010) (granting summary judgment against heirs based on S.C. Code An. 15-39-870 against heirs with potential claims to property who brought a quiet title action claiming they were not properly served in the earlier foreclosure action “despite some irregularities” in the processing of the foreclosure action.)

CONCLUSION

For the reasons argued herein and in Appellant’s Brief, this Court should reverse the circuit court order which granted Hufton partial summary judgment and remand with direction to the circuit court to grant judgment to Flagstar on its motion for summary judgment. Hufton’s interest did not survive the foreclosure as ordered by Judge Stroman and that she no longer owns any interest in the property.

Respectfully submitted,



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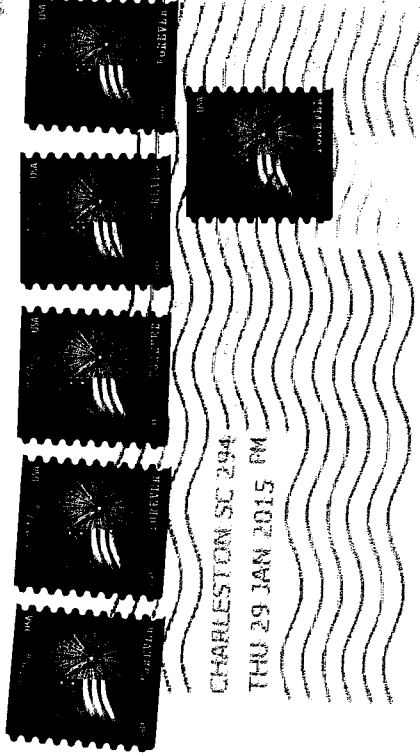
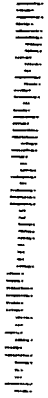
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE Horry COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-2861
Appellate Case No. 2014-002047

Phyllis Hufton,
..... Respondent,

v.

Flagstar Bank, FSB and John Doe,
..... Defendants

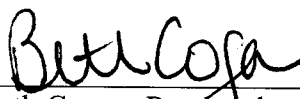
of whom

Flagstar Bank FSB is
..... Appellant

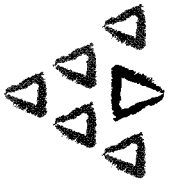
CERTIFICATE OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on February 19, 2015, I served a copy of the **Appellant's Initial Reply Brief and Appellant's Supplemental Designations** in the above-captioned case on the following individuals by standard US Mail:

**David Traywick, Esquire
Traywick and Traywick, LLC
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Beth Cogan, Paralegal

February 19, 2015
West Columbia, South Carolina



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PERSISTENT. UNWAVERING.

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February 19, 2015

Via U.S. Mail

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Phyllis Hufton V. Flagstar Bank, FSB, et al.*
Appellate Case No: 2014-002047

Dear Ms. Kitchings:

Please find enclosed for filing an original and one (2) copies of the **Appellant's Initial Reply Brief and Appellant's Supplemental Designations** in the above-referenced matter. After both have been filed, please return the clocked copies to our office in the enclosed, self-addressed, stamped envelope.

Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Beth Cogan, Paralegal
beth@desaballard.com

cc: *Via U.S. Mail*
David Traywick, Esquire
Via Email Only
Jeremy Hodges, Esquire
Brian Barnwell, Esquire

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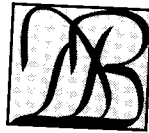
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