PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas-Master-in-Equity

Joseph F. Strickland, Master-in-Equity, Judge

Opinion No. 2014-UP-435 (S.C. Ct. App. filed Feb. Dec 3, 2014)

SCBT,N.A,

Respondent,

v.

Sand Dollar 31, LLC, and
Rhonda Meisner, Defendants,
of Whom Rhonda Meisner is
Appellant.

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The pro-se Petitioner certifies that the Petition for Rehearing was made on December 18, 2014 and finally ruled on by the Court of Appeals on January 23, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the personal judgments against Meisner based on the guaranty agreements that were were entered without following the Supreme Court's instructions for completing the form 4 were valid?

2. Did the Court of Appeals err in finding the Bank proved the legal status of Meisner as an individual guarantor as opposed to a member of Sand Dollar 31, LLC?

3. Did the Court of Appeals holding that the Master-in-Equity could enter judgment against a guarantor prior to the foreclosure sale pursuant to S.C. Code Ann. §29-3-650 rather than S.C. Code Ann. §29-3-660 violate the due process clause of the United States Constitution.

4. Did the Court of Appeals err in taxing attorneys fees to Meisner with only the deposition testimony as evidence and no itemization of attorneys fees or affidavit?

STATEMENT OF THE CASE

On September 22, 2011, SCBT, N.A. brought an action of foreclosure against Sand Dollar 31, LLC (hereinafter "Sand Dollar") on two rental houses and the enforcement of a guaranty agreement against Ms. Rhonda Meisner (hereinafter "Meisner") that was associated with the loans. **(R.p.14 ¶ 2-4).** Sand Dollar and Meisner answered the complaint via their attorney Glenn Bowens and counterclaimed requesting a declaratory action to determine the rights and responsibilities of each of the legal entities pursuant to a mortgage and guaranty agreement. **(R.P. 53)** Meisner and Sand Dollar also promptly petitioned for their appraisal rights pursuant to S.C. Code Ann. §29-3-680 et seq., which the bank did not oppose. **(R.p.183)** Meisner testified she had lost her job and once she retained

a new position brought loan current but the bank continued with the foreclosure in process on both properties. **(R.p.75 lines1-24).**

Prior to the foreclosure hearing, counsel for the Defendants, Glenn Bowens, based on conversations with the Bank's attorney, Teri Stomski was under the impression that the deficiency would be determined after the sale of the properties and application of the appraisal statutes which is consistent with S.C. Code Ann. §29-3-660. The agreement was acknowledged by opposing counsel, Teri Stomski who commented at the opening of the foreclosure hearing that the hearing was limited to the amount of the foreclosure and whether the foreclosure could proceed.**(R.p.62 lines 6-15).** The Court agreed that the sale and appraisal rights would need to be determined prior to the deficiency being entered. **(R.P.87 lines 16-25).** The foreclosure hearing was held on April 25, 2012, at the conclusion of which the Master-in-Equity ruled evidence of the debt was sufficient and the properties would be scheduled for foreclosure at the June foreclosure hearing but that both Sand Dollar and Meisner retained their appraisal rights.**(R.p.8 l: 22-25; 82-83:1-19)** The bank, prior to the sale of the properties and appraisal amounts being subtracted from the judgments against Sand Dollar, entered dual judgments (including the amounts) in the public record against Sand Dollar and Meisner in contradiction to the Supreme Court Instructions for entering form 4 data . **(R.p.88-89:1-5).** The bank had initiated the foreclosure under the deficiency statute §29-3-660, also known as the deficiency statute. **(R.p. 24)**

Upon receiving notice of the filed judgments in the public records, Mr. Bowens filed a motion to alter and amend the judgments pursuant to Rule 52, 59 and Rule 60. **(R.p.133-135).** Instruction #10 of the form 4 state provides "When an order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Public Index section, unless the order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC code." **(R.p. 134 at #6).** The Order of Foreclosure did not expressly require the judgments to be entered prior to the judicial sale. **(R.p.14-20)** In fact, the Order specifically provides "After crediting the proceeds of sale, net of any commission on sale, an Order for Deficiency Judgment shall be entered without further notice or hearing. **(R.p.19 at #33 final sentence.)**

Importantly, during the foreclosure hearing, the Bank did not determine the legal status of Ms. Meisner under the guaranty agreement. **(Rp.68 lines 4-25;69:1-13)** Ms. Meisner did not testify to the capacity that she signed the guaranty agreements.**(R.p.73 lines 17-23)** She did however; indicate her status as member of Sand Dollar in the mortgage documents immediately under her name. **(R.p.33)** The guaranty agreement itself does not provide any indication of the status of Meisner nor does it contain language such as personally and corporately or as an individual acting on behalf of the limited liability company or any such other designation suggesting the legal capacity of the guarantor. **(R. p. 48, 249)** The guaranty agreements attached to the lawsuits were limited to $36,000 and $31,140 **(R.p.48).**

After the foreclosure hearing on April 25, 2010, both properties were scheduled for the judicial sale on June 6, 2012. However, on May 29, 2010 prior to the sale, the Bank sent a letter to Meisner but did not copy her attorney stating judgments for the full amount of the foreclosure against Sand Dollar were entered against Sand Dollar and against her personally in the public records.**(R.p.149)** The Bank erroneously filed The form 4 against Sand Dollar and contemporaneously filed the same erroneous judgment amounts against Meisner. **(R.pp.12-13) (R.p.138).** The Bank did not follow the Supreme Court's form 4 instructions. **(R. p. 203-204)(R.p.153).** Instruction #10 on the form 4 provides that:

> When an Order of Foreclosure is filed, neither the parties or the debt owed should be listed in the information for the Judgment index section unless the foreclosure order specifically requires full entry of the judgment amount prior to the foreclosure sale. Instruction #12 Provides "[]...subsequent information, including the deficiency judgments can be added after the case is over...[]" **(R.p.204)(R.p.153).**

The bank then sent someone to bid on the properties at the judicial sale and bid $25,000 on one property and bid $10,000 on the other property.**(R.p.260).** The bidding remained open for 30 days because a deficiency was demanded. Mr. Bowens attorney for the Defendants sent a letter to the Judge on July 4, 2010 via facsimile requesting to delay the second (deficiency) foreclosure sale until the motion to alter and amend the judgments filed in the public record could be heard. Ms. Stomski, on behalf of the bank ,sent a letter to the judge requesting the deficiency sale not be delayed for any reason and stated her clients would be

prejudiced by any delay. The Court held a conference call with the attorneys on the morning of the deficiency sale, after which he ruled for the bank and allowed the deficiency sale to be held later in the day on July 7, 2012. Kevin Nowell, an agent for South Carolina Operating Room Equipment, LLC was the successful bidder at the deficiency sale for both properties.

A hearing was held on July 17, 2012 to discuss the motion to alter and amend. Ms. Stomski on behalf of the bank informed the judge that the bank would be filing a motion to vacate the sale based on the fact that South Carolina Operating Room Equipment, LLC was owned by Rhonda Meisner. On July 31, 2012 Meisner timely filed her petition for appraisal rights under S.C. Code Ann.§29-3-680. **(R.pp.181-185)**Mr. Bowens filed a memorandum on the guaranty agreement on August 10, 2012. **(R.p.190)**Meisner also filed a memorandum on the guaranty agreements. The bank filed a memorandum on the guaranty agreements on August 24, 2010.**(R.p.216)** The bank filed a motion to vacate the sale on September 6, 2012 naming Meisner and Sand Dollar as defendants but not the current legal owner of the properties South Carolina Operating Room Equipment, LLC.**(R.p.260)** Judge Strickland sent a notice of hearing regarding the Banks motion to vacate the sale and scheduled the hearing for November 6, 2012. **(R. p.2)** Defendants entered a memorandum on Judicial estoppel and the appraisal statutes. **(R.p.267)**Rick Gleissner entered an appearance on October 1, 2012) on behalf of South Carolina Operating Room Equipment, LLC to answer the Banks Motion to Vacate the Judicial Sale. **(R.p.265)** Gleissner filed a memorandum in opposition to the motion to vacate the judicial sales. **(R.p.**

272) When the parties arrived at the hearing on November 6, 2012, the Court informed the parties due to the presidential election , there was not a court reporter available and if necessary, he would have another record on the hearing. At the conclusion of the hearing, Judge Strickland requested Ms. Stomski give him the order denying the motion to alter and amend the judgment amounts to sign, which he did in the presence of all of the participants. **(R.p.1)**

The Court of Appeals affirmed the judgment of the circuit court in the consolidated appeal SCBT, N.A. v. Sand Dollar 31, LLC and Rhonda Meisner of whom Rhonda Meisner is the Appellant Op. No. (S.C. Ct. App. filed Dec 23, 2014). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

1. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE JUDGEMENTS WERE ERRONEOUSLY ENTERED BASED ON THE SUPREME COURT'S INSTRUCTIONS FOR COMPLETING THE FORM 4 FORM WHEN A MORTGAGE FORECLOSURE ACTION IS FILED PURSUANT TO THE DEFICIENCY STATUTE S.C. CODE ANN.§29-3-660

The Court of Appeals affirmed the Magistrates ruling based on application of S.C. Code §29-3-650, however, the foreclosure action against Sand Dollar was initiated under S.C. Code Ann. § 29-3-660. **(R.p.14)** The Court of Appeals ruled that the Magistrate had the authority under the laws of South Carolina to simultaneously enter an order of judgment and an order of foreclosure pursuant to S.C. Code Ann. §29-3-650. However, reliance on S.C. Code Ann. §29-3-650 must be consistent with the Order of Foreclosure and the Supreme Court's instructions for entering judgments on the Form 4 or risk violating the due process

clause of the United States Constitution because filed judgments immediately attached to all properties owned by the entities listed in the judgment roles. Additionally, interest begins to accrue on the entire debt at a rate greater than was in the mortgage contract on the date the judgment is entered even though Ms. Meisner was not a party to the foreclosure action, only the signer of the guaranty agreement.

While S.C. Code Ann. §29-3-650 does provide for the simultaneous judgment of foreclosure and judgment *against the mortgagor*; it does not provide for the simultaneous entry of judgment against guarantors who are *not also mortgagors.* (emphasis by petitioner). In either case, whether Meisner is deemed an individual or a member of Sand Dollar with reference to her signing the guaranty agreement, the judgment is erroneous and illegal.

First, if Meisner was acting as a member of Sand Dollar by signing the guaranty and not as an individual, allowing the judgments to stand would violate S.C. Code Section 33-44-303(a) which provides:

> Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts obligations, and liabilities of the company. A member or manager is not personally liable for a debt , obligation, or liability of the company solely by reason of being or acting as a member or manager.

Second, if her legal status was deemed to be as an individual subject to the guaranty agreement then S.C. Code Ann. §29-3-660 does not allow for the simultaneous entry of judgment as approved by the Court of Appeals against guarantors. Additionally, the form 4 instructions from the Supreme Court of

South Carolina also directs entry of judgments consistent with S.C. Code Ann. § 29-3-660 and following the instructions prevent violations of the due process clause of the United States Constitution. The instructions take into account crediting the sale of the properties and the legislative protections afforded mortgagors and guarantors under the appraisal statutes.

The Statutes for foreclosure are different for Mortgagors and for Guarantors. The amounts of the judgments entered in the public roles should be done in accordance with the Supreme Court form 4 instructions which reflect the intent of the statute and therefore the legislature in foreclosure actions. This process protects the rights of the parties so as not to prejudice the parties during the pendency of the entire multi-step procedure. While S.C. Code Ann §29-3-650 states the Court may render judgment against the parties liable for the payment of the debt *secured by the mortgage* and order sale of the premises at the same time that was referenced in the Court of Appeals Order of December 3, 2014. The S.C. Code Ann. §29-3-650 is silent as to non-mortgagors. Here, the bank initiated a foreclosure action under S.C. Code Ann §29-3-660 which states:

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

Here the only mortgagor was Sand Dollar 31, LLC as Meisner signed the Mortgage loan in her capacity as member of Sand Dollar 31, LLC which was noted above the signature line on the mortgage **(R.p.44)** The difference between the two statutes (S.C. Code Ann. §29-3-650 and §29-3-660) reflects the legislative intent in mortgage foreclosure proceedings that require a deficiency and *have persons or entities other than* the mortgagor potentially responsible for the debt .(emphasis added by Appellant). This bifurcated approach prevents violations of the due process clause, because enrolled judgments act as a lien on uninvolved but owned properties of the person or entity affected by the judgment.

The Master in Equity, the Honorable Joseph Strickland, contrary to the statute sued upon (better known as the deficiency statute)(S.C. Code Ann. 29-3-660)**(Rp.17 at ¶18),** contrary to his instructions to the Bank in his Order of Foreclosure **(R.p.19 at ¶ 33),** and contrary to the South Carolina's Supreme Court's instructions for completing the Form 4 in mortgage foreclosure actions **(R.p. 203)** allowed the Bank to enter judgments against Meisner *prior* to the judicial deficiency sale and *prior* to the determination of the valuation of the property via the appraisal statutes. Since the foreclosure was initiated under S.C. Code Ann. §29-3-660 the entry of the full judgment amounts against the guarantor Rhonda Meisner was in error.

2. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE JUDGMENTS AGAINST MEISNER WERE ERRONEOUS BECAUSE THE BANK, DURING THE FORECLOSURE HEARING, DID NOT PROVE THE STATUS IN WHICH MEISNER SIGNED THE GUARANTY AGREEMENT AS AN

INDIVIDUAL OR AS A MEMBER OF SAND DOLLAR 31, LLC

The Court of Appeals also determined issues first raised in a S.C. R. Civ. P. Rule 59-e motion were not properly before the Court of Appeals.**(Order of Court of Appeals Dec.23, 2014 p.3)** The Petitioner argued in a judge alone trial pursuant to S.C. Code of Civ. P. Rule 60, the Court can re-open the case and take additional testimony and make additional findings of fact. **(Petition for rehearing p.2).** If the case was not re-opened, then the testimony and evidence during the mortgage foreclosure hearing did not prove the legal status of Meisner and the judgments against Meisner individually should not stand.

Importantly, the evidence before the Court via the testimony of the witnesses (Ms. Wolfman for the bank or Meisner's testimony) or the guaranty agreement itself did not give any evidence as to the capacity under which Ms. Meisner was functioning when she signed the guaranty agreement; that is, as the member of Sand Dollar 31, LLC or in her individual capacity. Ms. Wolfson's testimony regarding the note, mortgage and guaranty agreement is found in the record at **R.p.68 lines 4-25;69 lines 1-13.** Ms. Wolfson's testimony or the documents admitted into evidence do not reflect that Meisner was acting on her own behalf instead of Sand Dollar 31, LLC in her testimony. Ms. Meisner's only reference to her relationship with Sand Dollar 31, LLC is in the following interchange:

Q: And explain your relationship to Sand Dollar 31, LLC.
A: I'm the member of Sand Dollar 31, LLC **(R. p. 73 lines 18-23)**

If the Court denied the motion to alter and amend (S.C.R.C.P. Rule 59-e) which accompanied the motion for relief of judgment (S.C.R.C.P. Rule 60), then the Plaintiff Bank, during the foreclosure hearing, did not show how Meisner in her individual capacity was implicated under the guaranty agreement. The guaranty agreement that she signed was " for the account of Sand Dollar 31, LLC". **(R.p.48)** The documents submitted by the bank as part of the foreclosure action did not include Sand Dollar's articles of organization or any other evidence to determine Meisner's legal status or what is necessary for Meisner to do in order to act on behalf of Sand Dollar; as such, the guaranty agreement could be viewed by a third party as a right to act on behalf of Sand Dollar. *Dutch Fork Development Group II, LLC and Dutch Fork Realty, LLC v. SEL Properties, LLC and Stephen E. Libscomb of whom Stephen E. Lipscomb is the Appellant.* Opinion number 27139 Heard May 2, 2012- refiled August 22, 2012.

Also S.C. Code Section 33-44-303(a) provides:

> Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts obligations, and liabilities of the company. A member or manager is not personally liable for a debt , obligation, or liability of the company solely by reason of being or acting as a member or manager.

If the Court of Appeals rules that the foreclosure hearing was not properly re-opened by the Master in Equity via the S.C. Rules of Civ. P. Rule 60 motion; then the record, during the foreclosure hearing and properly before the Court, does not implicate Meisner's personal responsibility for the debts of Sand Dollar

31, LLC to any degree via the guaranty agreement. The arguments related to the guaranty agreement occurred after the foreclosure hearing and if the Court did not re-open the case then those arguments are not preserved for review as they are part and parcel to the S.C.R.C.P. Rule 59-e and Rule 60 motion.

The guaranty agreements that were part of the foreclosure hearing were in the amounts of $31, 140 and $36, 000 . **(R. p. 31;p. 48-49)** The judgments entered by the bank were for the full foreclosure amount in excess of the limitations of record and did not take into account the documents submitted into evidence. The fact the guaranty agreements themselves did not reflect the capacity of Ms. Meisner was argued in the initial appellate brief. **Final Brief of Appellant,(R.p. 22 at12-20)**

3.THE COURT OF APPEALS SHOULD HAVE HELD THE JUDGMENTS AGAINST MEISNER WERE ERRONEOUS BECAUSE THEY MUST BE APPLIED ACCORDING TO §29-3-660 IN ORDER TO PREVENT A VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The Court of Appeals sanctioned the judgments entered against Meisner applying S.C. Code Ann. § 29-3-650 when the lawsuit was initiated under S.C. Code Ann. § 29-3-660 and this violates the due process clause of the United States Constitution. South Carolina Code Ann. §29-3-650 refers to mortgagors exclusively. Here, Meisner is the guarantor regardless of whether she signed the guaranty agreement as a member of Sand Dollar or individually, in either event as the guarantor, only S.C. Code § 29-3-660 applies to judgments against her. Because judgments attach *to all properties owned* by the judgment debtor and therefore could potentially be lost in an action for enforcement of the judgment the entry of the judgments violates the due process clause.

Additionally, because the Master-in-Equity noticed a hearing without a Court reporter and at the end of the hearing ruled on the judgments; he violated the holdings by the Supreme Court in *Moore v. Moore*, 376. S.C. 467, 657 S.E. 2d 743 (2008). While the Respondents characterize the appeal that is the subject of this petition for certiorari as interlocutory, the Appellant notes that once a judgment is entered in the public roles it is immediately appealable as it involves a substantial right. The Master-in-Equity may retain jurisdiction over the deficiency and appraisals of the property however; by holding a hearing without a Court reporter he violated the rulings of the Supreme Court which the S.C. Court of Appeals has sanctioned by not remanding the entry of the judgments back based on facts of this case . Specifically, Meisner did not have according to the Supreme Court's holding in *Moore* (2) (an) adequate opportunity for a hearing.(3) the right to introduce evidence or (4) the right to confront and cross examine the bank's representative regarding the Motion to Vacate due to the lack of the Court reporter.

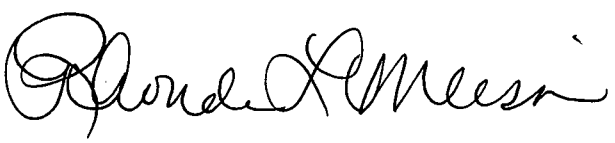
It is axiomatic that if there is not a Court reporter available you cannot preserve for review key arguments regarding the Master-in-Equity's denial to alter and amend the judgments amounts. The Master's denial of the motion to alter and amend was in writing which starts the 30 day clock. Because the Master-in-Equity entered the denial of the motion to alter and amend the judgments at the end of the hearing, a promised future hearing did not protect Meisner from the erroneous judgments already entered against her as the denial started the 30 day clock for appeal.

4. THE COURT OF APPEALS SHOULD HAVE HELD THAT ALL OF THE ATTORNEYS FEES SHOULD HAVE BEEN REMANDED SINCE NO AFFIDAVIT OR ITEMIZATION OF FEES WAS FILED IN THE CASE.

While the testimony of Wendy Wolfson from the bank was sufficient to prove the expenses owed by Sand Dollar as part of the foreclosure proceeding, her testimony was not sufficient to explain how these expenses should be taxed to Sand Dollar or Meisner. In South Carolina's proof based pleading system it is not only required to show the Bank paid the expenses but our system requires evidence to prove Sand Dollar owed the expenses as part of mortgage documents and the foreclosure and that there is some basis for the transfer of the expenses to Meisner via the guaranty agreement. Since the documents associated with the foreclosure hearing including the guaranty agreement do not specify how Meisner will be individually responsible for the attorneys fees; shifting the expenses from the bank to Sand Dollar and then from Sand Dollar to Meisner in her personal capacity must be proved.

WHEREFORE, based on the foregoing, Ms. Meisner respectfully requests the South Carolina Supreme Court grant this Petition for a Writ of Certiorari.

Respectfully Submitted,



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PROOF OF SERVICE PETITON FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

The undersigned has served a copy of the Petition for Writ of Certiorarai to the South Carolina Court of Appeals via hand delivery and the other attorneys of record Teri Kimball-Callen Stomski and Jason Wyman of Rogers, Townsend and Thomas, PC 220 Executive Center Drive Columbia SC 29210 via US Mail postage prepaid this day February 23, 2015 at the same time she filed the Petition and Appendix with the Supreme Court.

Feb 23, 2015

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