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.

REPLY TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION FOR A WRIT OF CERTIORARI

I. A review of whether the Supreme Court's instructions for filling out form 4 judgment forms are compulsory or permissive when a deficiency is demanded is a special and important reason to grant the petition for certiorari. Judgments entered via form 4's affect real property not involved with the foreclosure action because they immediately attach to other properties.

As an initial matter, the petitioner, Rhonda Meisner, submits that her petition for a writ of certiorari encompasses special and important reasons that could potentially affect many of the citizens of South Carolina during foreclosure proceedings when a deficiency is demanded. Mortgages, notes and guaranty agreements are separate and distinct legal instruments and contracts.

First, the Court of Appeals ruling affirms SCBT, the plaintiff bank's non-compliance with the Supreme Court's instructions for completing a form 4 judgment enrollment form when a deficiency is demanded in a mortgage foreclosure action (which for all intents and purposes is an Order of the Supreme Court of South Carolina) and has the effect of placing liens on property not included in the foreclosure action.

The respondents refusal to follow the Supreme Court's instructions for entering judgments and the ratification by the Court of Appeals via their affirmation of the ruling is at the heart of this appeal. It is important for the Supreme Court to clarify the Court's instructions for entering form 4 judgments; whether the Supreme Court's instructions are permissive e.g. banks and attorneys *may or may not* follow the instructions or compulsory e.g. banks and attorneys *must* follow the instructions.

The Petitioner argues ignoring the Supreme Court's instructions has the effect of violating the due process clause of the United States Constitution because liens immediately attach to other properties owned by the guarantor which were not part of the foreclosure action. Additionally, the statute upon which the lawsuit was filed and referenced in the amended complaint notes S.C. Code Ann. §29-3-660 not §29-3-650 .

Second, the ruling by the Court of Appeals affirms the Master in Equity's expansion of S.C. Code §29-3-650 to include guarantors which is contrary to the plain language of the statute and legislative intent. This cross use of applying a different statute than the one under which the action was initiated violates the due process clause. This "cross statute ruling" has the effect of nullifying the protections of the deficiency statute and the appraisal statutes in one fell swoop that were put in place to protect mortgagors and guarantors. The legislature enacted a separate statute applicable to non- mortgagors involved in mortgage foreclosure proceedings which is S.C. Code §29-3-660 and is the statute that was referenced in the amended complaint.

Respondents argue guarantors (e.g. Meisner) are responsible for debts secured by the Mortgage, this is erroneous because only mortgagors (e.g. Sand Dollar) are responsible for the mortgage as signatories. **(Resp. Opp. to pet. for cert. p. 8 at IV)** A mortgage is *security for the note* signed.**(R.p.26 at No. 8)** A guaranty agreement *is also a separate security agreement for repayment of the note* (not the mortgage).**(R.p.26-27 at No. 11)(** The mortgage and guaranty agreement involve separate distinct legal entities which have separate distinct

legal obligations pursuant to the respective instrument of guaranty. Guarantors are only responsible for the debt via the guaranty agreement unless they also signed the mortgage and are also mortgagors. Otherwise, there would not be a need for a guaranty agreement and the separate statutes the legislature enacted would not be necessary.

Third, the statutes S.C. Code Ann. §29-3-650 and §29-3-660 as well as the documents themselves indicate a different "capacity" between the mortgagors and guarantors during foreclosure proceedings as do the bank's pleadings; the cross use of the statute's to affirm judgments is a novel application which should be reviewed by the Supreme Court because as the petitioner argues this cross use potentially violates the due process clause. The Court's cross application of statutory constructs has the potential for violating the due process clause by allowing erroneous liens to be placed on property owned by non- parties to the foreclosure action without completing the processes outlined in the Supreme Court's instructions for completing the form 4 or the procedures outlined in S.C. Code Ann. §29-3-660. Mortgages, Notes and Guaranty agreements are separate contracts with separate obligations and terms and conditions which is why the legislature has two separate statutes that contemplate the different capacity of the parties during a mortgage foreclosure proceedings when a deficiency is demanded.

Respondents suggest that the Orders do not conflict with prior decisions of the Supreme Court; however, the petitioner argues that instructions from the Supreme Court are compulsory and therefore function as Orders of the Supreme

Court.

Respondents also suggest that the decision does not conflict with prior decisions of this Court. This decision is in direct conflict with *Dutch Fork Dev. Grp. II LLC v. SEL Properties, LLC* 406 S.C. 596, 753 S.E. 2d 840 (2012). Dutch Fork stands for the proposition that parties *must prove* the legal capacity of the actions of the LLC members in order to prove their responsibility for torts or other actions as a an individual or as a member.

Here, like in Dutch Fork the bank did not prove the capacity Meisner signed the guaranty agreement *during* the foreclosure hearing. Whether she signed as an individual or a member of the LLC and the documents do not address whether she signed the documents in her personal capacity or as a member of the LLC *as such there is no evidence from which the Master in Equity could rule* and the Court of Appeals affirm that Meisner was personally responsible for the debts without re-opening the case pursuant to Meisner's Rule 60 motion.

The arguments regarding the guaranty agreement were pled as both a defense and as an affirmative cause of action via the request for a declaratory judgment and specifically referenced the guaranty agreement was subject to the deficiency statute as outlined in S.C. Code Ann. §29-3-660 and the appraisal statute. **(R.p.55 at No. 3)** Meisner also noted in the answer she signed the agreement on behalf of Sand Dollar and craves reference to the actual guaranty agreement. **(R.p.56-57 at No. 11-14)** The terms of the guaranty agreement were first elucidated (outside the actual document and the testimony at trial) in the Rule 52, 59-e and 60 motion when the bank entered judgments against Meisner prior to

the judicial sale without first applying the proceeds of the sale and the application of the appraisal statutes to come up with a figure as contemplated in S.C. Code Ann. 29-3-660.

II. The issues presented in the petition for certiorari were presented to both the Court of Appeals and were reiterated in the petition for rehearing.

The respondent suggest that some of the issues have not been presented to the Court of Appeals and in the petition for rehearing.

> **Whether the Master's entry of Form 4 judgments pursuant to S.C. Code Ann. §29-3-650 violated her due process rights because SCBT named her in the lawsuits pursuant to §29-3-660. (Resp's brief in opp. to pet. for Cert. p.6 first bullet).**

Petitioner Meisner specifically brought up the issue of the form 4 entry and non compliance with the Supreme Court's instructions for completing the form 4 in the Rule 59-e motion when the bank unexpectedly entered the judgments via form 4 **(R.p.141),** the final brief of the Appellant. **(App. Final Brief p. 11)** She specifically referenced the steps for the entry of judgments were not followed in the petition for rehearing and that the steps did not comply with the Master in Equity's Order. **(Pet. for Rehearing p.4).**

While not articulated in constitutional terms, the issue of the premature entry of judgments by not following the Supreme Court's instruction for entry in form 4 instructions and not following the Master in Equity Order of foreclosure results in premature and inaccurate judgments being filed against Meisner was absolutely argued at all phases of review and is preserved for review. **(R. p. 11).**

Importantly, it was not until the ruling by the Court of Appeals did the "cross use of statutes" occur when the Court affirmed the Master's ruling utilizing

§29-3-650 instead of the statute cited in the complaint against Meisner for the deficiency §29-3-660.

SCBT limited the scope of the foreclosure hearing to the amount of debt and whether the foreclosure could proceed based on an agreement and understanding between the attorney's, the foreclosure only involved Sand Dollar not Meisner as the guarantor. **(R.p.62 lines 6-15)** The Master in Equity acknowledged that the deficiency had not been determined and that the sale and appraisals would have to be complete. **(R. p. 87 lines 2-25)** However, he then sanctioned the Bank's premature entry of the judgments on the form 4 when he signed the form 4 Order in contradiction of his Order of foreclosure and the Supreme Court's instructions for filling out the form 4 judgments when a deficiency is demanded.

Whether the lack of a court reporter violated her due process rights was not brought up until her petition for rehearing.(Resp. brief in opp. to pet. for Cert. p. 6 bullet 2)

The lack of a court reporter was noted in the final brief *fact* portion and reiterated in the Petition for rehearing. **(App. Final brief.p.6) (The petition for rehearing p. 7.)** The lack of court reporter occurred at the November 6, 2012 hearing which was after the initial Rule, 52, 59-e and 60 motion was filed in July of 2012. The arguments at the hearing could not be recorded as a result and it was *at the end of this* hearing the Master in Equity denied the July 2012 Motion to alter and amend the May 2012 judgment. As such lack of a court reporter at the November 6, 2012 was noted to the Court of appeals in the final brief of Appellant and in the Petition for rehearing.

As the Supreme Court ruled in *Moore v Moore,* judicial violations of due process occurs when the Court deviates from standard procedures (such as this case by not having a court reporter) at a noticed hearing because the rights of the parties to a fair hearing are not protected. *Moore v. Moore,* 376 S.C. 467,657 S.E. 2d 743 (2008). Here, the Master in Equity noticed a hearing regarding the valuation of the properties and the motion to vacate the sale and did not provide a court reporter, promised a future hearing with a court reporter and then proceeded to sign the motion to alter and amend at the conclusion of the hearing which started the 30 day clock for appeal of the judgment and effectively ruled the judgments could stand.

Whether the Master's entry of the form 4 judgments against her violated S.C. Code Ann. §33-40-303(a). (Resp. opp. to pet. for Cert. p. 6 bullet 3)

The United States Supreme Court explicitly described a motion under federal rule 59(e) as one which "involves reconsideration of matters properly encompassed in a decision on the merits." *Osterneck v. Ersnt & Whinney,* 489 U.S. 169,174 109 S.Ct. 987,990 103 L.Ed 2d 146,154 (1989). Here, the application of judgments against a guarantor necessarily *requires* the Bank *prove the capacity* by which a guarantor signed the agreement (if the agreement does not do so) during the foreclosure proceeding when the guaranty is on behalf of an account of the limited liability company. The bank pled that the company that was a defendant of the foreclosure action is a limited liability company pursuant to S.C. Code Ann. §33-15-101**(R.p.25 at No. 2)**

The Bank cannot shift the fact they are required to prove their case that the guaranty was signed in her personal capacity to implicate Meisner in a foreclosure

action. Meisner specifically raised that she signed and executed the guaranty for the Defendant Sand Dollar as a defense in her pleadings and Meisner requested as a cause of action a declaratory judgment to determine the rights and responsibilities of the parties with regard to the guaranty agreement.**(R.p.50 at No. 3)(R.p.53 at No. 18)** It is the bank that is required to prove the individual status of Meisner signing the guaranty agreement and this fact is a matter encompassed within a decision on the merits of the case and properly encompassed in the Rule 59-e motion as the motion itself craves reference to the actual document as well as the declaratory judgment. **(R.p.190)**

Whether the Master's award of attorney's fee should have been taxed against only Sand Dollar 31, LLC and not against Meisner individually. (Pet. Writ. Cert. p. 15) Meisner did not raise this issue in her Brief of Appellant, Reply Brief, or Petition for rehearing in the Court of Appeals. In her Motion to Alter and Amend and her appellate briefs in the Court of Appeals, Meisner challenged only the amount of the attorney's fees awarded, and never challenged the allocation of that award between and her co-defendant.

In each of the above briefs petitioner Meisner questioned the judgments against her via the erroneous form 4 entries and the fact the respondent bank did not prove her capacity as an individual for the Master in Equity to determine the amount of the judgments. The arguments that the attorney's fees were not proved in the foreclosure case were argued as well as the fact the capacity of Meisner was not proved. It is axiomatic that if the individual status is not proved then the judgments including attorney fees are not proved since the attorney's fees are taxed to Meisner via the guaranty agreement and is encompassed in the argument the bank did not prove the individual capacity of Meisner as a signer of the guaranty agreement.

III. The capacity of Meisner with regard to the guaranty agreement was not proved by the bank during the foreclosure hearing which was required in order to file judgments against her for Sand Dollar's debts. The Court of Appeals and the Supreme Court reviews equity decisions of the Master in Equity de novo.

The fact portions of foreclosure proceedings cannot be "rewritten" to support the arguments by the respondents and judgments by the Master in Equity. The bank pled as a cause of action breach of guaranty agreement. **(R.p.25 at No. 1)** Then they continued to plead as their fourth cause of action breach of personal guaranty against Meisner. **(R.p.29).**

Respondents suggest Meisner is required to prove her defense that the guaranty agreement was personal and not on behalf of Sand Dollar, this is true only *after* the plaintiff Bank has proved her capacity as an individual. Here, there was no evidence that the guaranty was executed in her personal capacity during the mortgage foreclosure action. **(Pet. for Rehearing p. 5 lines 16-23 and p. 6;7: lines 1-10)** The bank did not prove Meisner's capacity at the foreclosure hearing. (Also the Court of Appeals did not give the reason they affirmed the judgment as Respondent hypothesizes based on S.C. Code Ann. §29-3-650 so the Respondents suggestion the "capacity" defense was not preserved is meritless because the argument is "fairly included on a review of the merit of the judgments".

The Plaintiff bank ,SCBT as a fourth cause of action, described the guaranty agreement signed by Meisner associated with the foreclosure as a personal guaranty but did not prove the capacity of Meisner during the foreclosure proceedings.**(R.p.29)** Further in their request for relief they requested the Court

to Order an amount "less any sums which the Plaintiff may recover from Borrower on the Note, and[]." **(R.p.31)** The Respondents suggest they proved the status of Meisner during the foreclosure hearing; however, there is no evidence they proved that Meisner signed the guaranty in her individual capacity and the agreements themselves do not evidence her capacity.**(R.p.68 lines 4-25; 69 lines 1-13)**

As part of the answer Meisner specifically notes at #3 Meisner executed a "guarantee for the Defendant Sand Dollar [] subject to reduction based on appraised value of the property." Further, the answer specifically craves reference to the guaranty agreement for the exact terms.**(R.p.51 at #13).**

The counterclaim which was before the Court at the foreclosure hearing requests a declaratory judgment for among other things "[t]o determine a question in actual controversy between or among parties as to their respective rights and liabilities under a note, Mortgage and Guarantee agreement[]"**(R.p.53 at #18 p.54 at#24).** It was not as the Respondents argue limited to the appraisal rights of the parties. **(Return to Petition p. 2 line 6).** The Respondents did not prove the status of Meisner during the foreclosure hearing and the guaranty agreement itself did not offer evidence as to the capacity of Meisner with regard to the guaranty agreement.

The respondents argue the Bank proved Meisner's personal guaranty of the debt in the foreclosure proceedings as an individual and then the burden shifted to Meisner to prove otherwise. **(Resp. Opp. to pet. for Cert. p.8 lines 6-7)** This is inaccurate. The following interchange occurred with the Bank's

representative Wendy Wolfman:

(R. p. 68 lines 23-25; p. 69 lines 1-13)

Direct examination of Wendy Wolfman by Teri Stomski (attorney for SCBT):

> Q. And can you tell me who it states as the borrower?
> A. **Sand Dollar 31, LLC**
> Q. And who signed that mortgage?
> A. **Rhonda Meisner**
> Q All right. And do you recognize , this is Exhibit C to the complaint, incorporated herein, do you recognize this document? It's a two page document.
> A. (by Ms. Wolfman): **I do. This is the guaranty agreement.**
> Q. All right. And that is...who is the guarantor stated on that?
> A. **Rhonda Meisner**

There is nothing in the above interchange that proves the status of Meisner as an individual instead of as a member of Sand Dollar. Likewise, the examination of Ms. Meisner does not indicate her capacity. **(R.p.73 lines 20-23)**

If as the bank argues the case was not re-opened by the Master in Equity's request for briefing on the guaranty agreement; then the evidence from the foreclosure hearing and the guaranty agreement itself is the only evidence from which the Master in Equity could have determined the rights, responsibilities and obligations of the parties including the capacity of Meisner as a signer of the guaranty agreement.

For the above reasons and all references to the record, the petitioner asks that the Supreme Court issue a Writ of Certiorari as the above questions are important and special and the cross application of the statutory ruling with the statute referenced in the complaint is a novel question.

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Respectfully submitted,

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April 23, 2015

PETITION FOR A WRIT OF CERTIORARI TO THE
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
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Joseph F. Strickland, Master-in-Equity, Judge

Civil Action Nos. 2011-CP-40-6317 and 2011-CP-40-6318
Opinion No. 2014-UP- 435 (S.C. Ct. App. filed Feb. Dec 3, 2014)
Appellate Case No. 2015-000352

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Petitioner.

CERTIFICATE OF SERVICE

The petitioner certifies she caused to be served on the respondent a copy of her reply to the petition for certiorari by mailing US postage prepaid to attorneys for the respondent Sean M. Foerster Rogers, Townsend and Thomas, PC post office box 100200 Columbia SC 29202 this day April 23, 2015

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