THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

RECEIVED
JUN 22 2015
S.C. Supreme Court

Case No. 2012-CP-46-03040
Appellate Case No.: 2015-001113

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, ... Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC, ... Defendants

Of whom Cora B. Wilks and David C. Wilks are ..... Petitioners.

Return to the Petition for a Writ of Certiorari

Michael J. Anzelmo
B. Rush Smith, III
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Respondent Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1

Introduction

In *Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1 v. Cora B. Wilks, David C. Wilks, et al.*, Op. No. 2015-UP-110 (S.C. Ct. App. filed March 4, 2015) (Shearouse Adv. Sh. No. 9 at 18) ("the Opinion"), the South Carolina Court of Appeals affirmed the trial court's dismissal of Petitioner's counterclaim. Petitioners Cora B. Wilks and David C. Wilks (collectively "Wilks") now petition this Court for certiorari.[1] As shown herein, the Wilks have failed to offer this Court any grounds that warrant certiorari as provide by Rule 242 of the South Carolina Appellate Court Rules. In fact, the Wilks do not cite ***any*** case law or authority to support their certiorari position. Instead, the Wilks seeks for this Court to simply revisit the same unpreserved arguments and issues accurately decided by the Court of Appeals without identifying any significant issues or inconsistency with prior decisions of this Court. The petition for certiorari should be denied.

Facts and Procedural History

Respondent Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1 ("Deutsche Bank"), initiated this action on May 20, 2011, by filing a complaint seeking to foreclose on a mortgage executed by the Wilks on June 1, 2005. {R. 6, 7}. In response, the Wilks filed an answer and counterclaim, admitting they executed the note and mortgage but sought to avoid the foreclosure on the ground that a licensed attorney did not supervise the closing. {R. 19, 20}. The

[1] Deutsche Bank cannot cite to the Appendix in this Return because the Wilks did not serve a copy of the Appendix on counsel for Deutsche Bank. All citations will be to the Record on Appeal.

Wilks relied solely on this Court's holdings in *Matrix Financial Services. Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011) ("Matrix"), and *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012) ("BAC"). {R. 21}.

Deutsche Bank filed a motion to dismiss the Wilks' counterclaim. {R. 49}. Deutsche Bank based the motion on the fact that this Court expressly held that the holdings of *Matrix* and *BAC* applied prospectively to mortgages recorded after August 8, 2011. {R. 50, 53-54, 56-57}. The Wilks' mortgage was recorded on June 1, 2005. {*Id.*; *see also* R. 6, 7}. Thus, the Wilks' claim that *Matrix* and *BAC* barred Deutsche Bank's foreclosure claim failed as a matter of law. {*Id.*}.

At the hearing on Deutsche Bank's motion to dismiss, the Wilks sole argument was that this Court's 2010 decision in *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), supported denial of Deutsche Bank's motion to dismiss their counterclaim, even in light of the prospectively application of the rule pronounced in *Matrix* and *BAC*.[2] {R. 54-55}. The Wilks argued *Coffey* was distinct from *Matrix* because that case involved out of state conduct whereas *Coffey* "involve[d] . . . actions within the state of South Carolina." {*Id.*}. Notably, the Wilks failed to argue that the *Matrix* and *BAC* rule did not apply because the lender closed the loan with disbarred counsel.[3]

[2] Despite this argument, counsel for the Wilks acknowledged at the hearing "that because *Matrix* is a later case in a line of cases and because it is the Supreme Court, it may be viewed as implicitly overruling or limiting [*Coffey*]." {R. 55}.

[3] The Wilks appellate argument was that Deutsche Bank should be barred from foreclosing because the mortgage was closed by an allegedly disbarred attorney. The arguments advanced to the trial court were distinct from the Wilks' appellate arguments. The Wilks made ***no*** argument related to disbarment as a distinguishing ground for *Matrix* and *BAC* before the trial court.

The trial court granted the motion to dismiss by written order. {R. 2-5}. The Wilks did not file any Rule 59, SCRCP, motion but did appeal to the Court of Appeals. {R. 58}. On appeal, the Wilks conceded "that their mortgage was filed June 1, 2005, prior to the issuance and prospective application of *Matrix*, August 8, 2011." {Appellant's Br. p. 5}.

Before the Court of Appeals, the Wilks shifted gears and argued—for the first time—that the trial court erred in holding that *Matrix* and *BAC* required dismissal of the counterclaim because Deutsche Bank committed a willful violation of the law because "the mortgage transaction in question was closed by—or with the connivance of—disbarred counsel." {Appellant's Br. p. 7}. Thus, rather than arguing that the Court of Appeals should follow *Coffey*, the Wilks argued that the Court of Appeals should reverse because the presence of an allegedly[4] disbarred counsel rendered *Matrix* and *BAC* inapplicable.

Deutsche Bank argued that the Court of Appeals should affirm the trial court's order because (1) the Wilks failed to preserve their appellate argument for review and (2) even if preserved, the trial court correctly granted the motion to dismiss because *Matrix* and *BAC* barred the Wilks counterclaim as a matter of law. {Respondent's Br. p. 5-8, 8-13}. The Court of Appeals agreed.

The Court of Appeals held that the Wilks failed to preserve their appellate argument for review. *See* Opinion p. 1. The Court of Appeals further held that even if

[4] On appeal, the Wilks argued that Matthew Davis, Esquire, participated in the closing in May 2005 even though he had been disbarred by this Court prior to that time. {Appellant's Br. p. 7 (arguing that "Appellants have alleged and presented *prima facie* proof, that the mortgage transaction in question was closed by . . . disbarred counsel")}. That argument lacked merit. Mr. Davis was not disbarred until December 5, 2011, and the Wilks closed their loan on May 23, 2005. *See In the Matter of Matthew Edward Davis*, Op. No. 27071 (filed Dec. 5, 2011) (disbarring counsel).

the argument were properly preserved the trial court properly granted the motion to dismiss the counterclaim pursuant to *Matrix*'s application date. *See* Opinion p. 1, n. 1 ("We also find Appellants' argument fails on the merits" under *Matrix*). The Wilks sought rehearing, and the Court of Appeals denied that petition. {Wilks Petition for Rehearing; Order denying Petition for Rehearing}. The Wilks petition for a writ of certiorari followed.

Argument

In the petition, the Wilks claim that the Court of Appeals erred in holding the Wilks' appellate arguments were not preserved for appellate review and in failing to address their claims on the merits. *See* Petition p. 4-5. Both arguments lack merit and do not warrant certiorari review by this Court. First, the Court of Appeals correctly held that the Wilks failed to raise their specific appellate argument to the trial court, and as such, the Court of Appeals was precluded from appellate review. Second, the Court of Appeals properly held that even if preserved the Wilks' argument still failed as a matter of law pursuant to *Matrix*. Thus, the petition should be denied.

As an initial matter, this Court should deny the petition because the Wilks fail to cite any authority in their petition. The Wilks merely make conclusory and unsupported statements. Therefore, the Wilks have abandoned their claims, and this Court should refuse to consider such arguments. *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (holding an issue is deemed abandoned and will not be considered on appeal if the argument in the brief is unsupported by authority); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (holding short conclusory statements unsupported by

authority are abandoned on appeal and not presented for review); *Butler v. Butler*, 385 S.C. 328, 343, 684 S.E.2d 191, 198-99 (Ct. App. 2009) (finding appellant abandoned certain issues when appellant "cited no statute, rule, or case in support of [appellant's] arguments in either [appellant's] argument section or [appellant's] 'Background Legal Principles' section" of appellant's brief).

Even if the Wilks had not abandoned their arguments, this Court should still deny the petition. In the petition, the Wilks first claim that they properly preserved their appellate argument for review. *See* Petition p. 4-5. The Wilks misapprehend our issue preservation requirements. The Court of Appeals properly found the Wilks' argument unpreserved for appellate review.

Our rules of issue preservation require the party to raise an argument with specificity in order to allow the trial court to first rule on the argument. *See, e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) (holding that our preservation rules require the party to be sufficiently specific in raising the issue in order to bring into focus the precise nature of the alleged error). If the party raises the issue with sufficient specificity and the trial court fails to rule on that specific argument, then it is incumbent on the party to seek a ruling via a motion to reconsider. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) (holding that (1) "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court" and (2) when the trial court does not rule on an issue, the party must file a Rule 59(e), SCRCP, motion in order to preserve the issue for appellate review). The Wilks failed to adhere to these requirements.

Before the trial court at the hearing on Deutsche Bank's motion to dismiss, the Wilks sole argument was that this Court's 2010 decision in *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), distinguished this matter from the rule pronounced in *Matrix* and *BAC*. {R. 54-55}. Notably, the Wilks failed to argue that the *Matrix* and *BAC* rule did not apply because the lender closed the loan with disbarred counsel.

The trial court granted the motion to dismiss by written order. {R. 2-5}. The order did not rule on any argument, even if made, that the loan was closed by disbarred counsel. {*Id.*}. The Wilks did not file any Rule 59, SCRCP, motion.

Before the Court of Appeals, the Wilks shifted gears and argued—for the first time—that the trial court erred in holding that *Matrix* and *BAC* required dismissal of the counterclaim because Deutsche Bank committed a willful violation of the law because "the mortgage transaction in question was closed by—or with the connivance of—disbarred counsel." {Appellant's Br. p. 7}. Thus, rather than arguing that the Court of Appeals should follow *Coffey*, the Wilks argued that the Court of Appeals should reverse because the presence of an allegedly disbarred counsel rendered *Matrix* and *BAC* inapplicable.

Based on the above, the Wilks failed to preserve their appellate argument for two reasons. First, the Wilks did not raise their disbarred counsel argument with sufficient specificity to the trial court, if at all. Instead, the Wilks argument to the trial court relied on the *Coffey* case and how that matter was distinct from their case. Therefore, the failure to properly raise any specific disbarred counsel argument to the trial court rendered the argument unpreserved for appellate review. Second, even if the

Wilks properly raised such an argument to the trial court at the hearing on the motion to dismiss, the argument was still unpreserved. The trial court never ruled on the Wilks' disbarred counsel argument, and the Wilks failed to request a ruling by a motion to reconsider. Thus, the Court of Appeals properly found the Wilks' argument unpreserved. This Court should deny the petition for a writ of certiorari.

Appellants also claim that the Court of Appeals erred in affirming the trial court's ruling that their counterclaim failed as a matter of law pursuant to *Matrix* . *See* Petition p. 5. That argument lacks merit.

In *Matrix*, this Court held that "[a]ll real estate and mortgage loan closings must be supervised by an attorney" and that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." *Matrix Fin. Servs. Corp.*, 394 S.C. at 138–39, 714 S.E.2d at 534. The *Matrix* rule only applied "to all filing dates after the issuance of this opinion," which was August 8, 2011. *Id.* at 140, 714 S.E.2d at 535. That filing date is "the date the document a party seeks to enforce was filed." *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 549-50 (2012).

In the present appeal, the Wilks admitted "that their mortgage was filed June 1, 2005, prior to the issuance and prospective application of *Matrix*, August 8, 2011." *See* Appellants' Br. p. 5. Thus, even if the Wilks loan was closed without a licensed South Carolina attorney, the counterclaim fails as a matter of law. The Court of Appeals correctly rejected the Wilks' argument and properly affirmed the trial court's application of *Matrix* to dismiss the counterclaim.

Conclusion

Based on the foregoing, this Court should deny the petition for a writ of certiorari.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo
SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Respondent Deutsche Bank

Columbia, South Carolina

June 22, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040
Appellate Case No.: 2015-001113

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, ... Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC, ... Defendants.

Of whom Cora B. Wilks and David C. Wilks are ..... Appellants

---

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Deutsche Bank National Trust Company, as Trustee for JPMorgan Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Return to the Petition for a Writ of Certiorari

Counsel Served:

John Martin Foster
Post Office Box 106
Rock Hill, SC 29731

Jennifer B. Lee
Administrative Assistant

June 22, 2015