

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2010-CP-10-5825
Appellate Case No. 2014-000906
2015-UP-353

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S.C. Supreme Court

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Trustee of the
American Mortgage Investment Partners Fund I Trust.....Respondent,

v.

Melissa Furmanchik; Masonborough at Park West Association, Inc.
and Wells Fargo Bank, N.A.,.....Defendants,

Of whom Melissa Furmanchik is the.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

The undersigned certifies that Melissa Furmanchik filed a Petition for Rehearing with the Court of Appeals which was ruled on with finality on August 19, 2015. (App. 459).

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err by affirming the lower courts' sua sponte actions to grant a new trial in defiance of the rules and precedent?
- II. Did the Court of Appeals err in a foreclosure case by failing to address the impact of the admitted divergent path of the mortgage from the note rendering the transfer of the mortgage a nullity?
- III. Did the Court of Appeals err by determining the foreclosing entity was a holder by virtue of bearer paper rather than a non-holder in possession?
- IV. Did the Court of Appeals err in finding that the testimony offered by a non-employee of the foreclosing entity was not hearsay?
- IV. Did the Court of Appeals err in finding the foreclosing entity was entitled to interest when the note failed to provide interest?

STATEMENT OF THE CASE

Pursuant to Rule 242 of the South Carolina Rules of Appellate Procedure, Melissa Furmanchik ("Appellant") seeks certiorari regarding the Court of Appeals' decision in Wilmington Savings Fund Society, FSB v. Melissa Furmanchik, Unpublished Op. No. 2015-UP-353 (App. 429). Appellant brought this appeal seeking to overturn the lower court's determination on several grounds the most focal of which is that the divergent path of the mortgage from the note precluded the prosecuting lender¹ from having an interest in the mortgage and therefore lack standing to foreclose.

¹ At the time of trial the prosecuting lender was Selene RMOF REO Acquisition, LLC (hereinafter "Plaintiff"). Throughout this Petition Appellant uses the term Plaintiff rather than Respondent because the current Respondent, Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Trustee of the

On July 20, 2010, Wachovia Mortgage Corporation initiated a foreclosure action on September 7, 2006, against David Furmanchik, now deceased, regarding a note and mortgage in the amount of \$464,000.00. (Hereinafter “Note 1”). Appellant, the former wife of David Furmanchik filed an Answer which includes the defenses of lack of standing, failure to provide notices as required by federal and state law and unclean hands. (App. 91-93).

On September 10, 2012, an Order of Substitution of parties was filed which states “the subject mortgage was subsequently transferred to Selene Finance LP, by assignment dated October 7, 2010, thereafter transferred to SRMOF-2009-1 Trust, by assignment dated March 29, 2011, thereafter transferred to Selene RMOF REO Acquisition, LLC [(hereinafter “Plaintiff”)], by assignment dated March 29, 2011.” (App. 10). On March 28, 2013, Appellant filed a Motion to Dismiss or in the Alternative for Summary Judgment for lack of standing. (App. 97). On May 20, 2013, the Master in Equity (“MIE”) filed an Order denying the relief sought. (App. 13).

On June 20, 2013, a foreclosure hearing was held. Plaintiff offered the live testimony of Ms. Clark, an employee of the servicer Selene Finance, LP. Through Clark Plaintiff’s Exhibit’s 1-10 and 2A were admitted into evidence over Appellant’s objections. After the close of the case the MIE issued an oral finding. While still on the record and again over the objection of Appellant, the MIE *sua sponte* admitted into evidence Plaintiff’s Exhibit 2B (hereinafter “2B”), without any testimony from Plaintiff’s witness Ms. Clark regarding the Exhibit. (App. 251-52).

American Mortgage Investment Partners Fund I Trust (hereinafter “Wilmington Saving”), was substituted in as Respondent by an Order dated the same day the Court of Appeals opinion was filed in this matter.

On June 28, 2013, prior to the MIE issuing an order memorializing his oral ruling, Appellant filed a Motion to Reconsider asserting error on the grounds that the Plaintiff failed to establish a proper foundation for any exhibit pursuant to Rule 803(6), SCRE; that Exhibit 2B was admitted without any witness testimony; that Plaintiff lacked standing because it was not a holder and the chain of title of the Note and Mortgage took divergent paths; and that Plaintiff failed to prove it was entitled to the interest it claimed was owed. On July 11, 2013, prior to issuing an order of foreclosure the MIE *sua sponte* issued an Order pursuant to Rule 50(d), SCRCF finding “that the matter should be reopened for the express purpose of taking additional testimony with regards to the note and subsequent modification agreement. This is done pursuant to Rule 50(d), SCRCF. This matter is to be reset for Monday, August 12 at 10:00 a.m.”(App. 18).

On August 12, 2013, a second hearing of foreclosure was held wherein live testimony was taken again from Ms. Clark and Plaintiff’s Exhibit 2C was admitted into evidence over Appellant’s objections. On February 7, 2014 the MIE filed an Order of Foreclosure. Appellant timely filed a Motion to Reconsider. (App. 40-50). The MIE denied Appellant’s Motion to Reconsider on March 28, 2014. (App. 36).

On April 25, Appellant filed her Notice of Appeal. On May 12, 2015, Plaintiff Selene RMOF REO Acquisition, LLC moved to substitute Wilmington Savings as Respondent (hereinafter “Respondent”), which was granted by Order filed on July 15, 2015.

By Opinion dated July 15, 2015, the Court of Appeals, affirmed the lower court by issuing an Order which merely cites to a number of authorities and addresses nothing

with particularity. (App. 429-32). Appellant filed a Petition for Rehearing on July 29, 2015, which was denied by Order filed on August 19, 2015. (App. 459).

**CONSISE ARGUMENTS IN SUPPORT OF THE PETITION FOR WRIT OF
CERIORARI**

I. A NEW TRIAL BY WAY OF *SUA SPONTE* RELIEF WAS NOT AVAILABLE.

A. The Court of Appeals erred by finding the Appellant did not preserve the issue that the lower court could not grant *sua sponte* relief.

In its canned Opinion the Court of Appeals addresses the issue of *sua sponte* relief by regurgitating the following: "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. . . A party cannot acquiesce to an issue at trial and then complain on appeal." (Citations Omitted)(App. 430). To the extent this is an opinion that the issue was not preserved, it is in error.

First the implied ruling fails to account for the fact the MIE issued the *sua sponte* order weeks after a trial, outside of any hearing or the presence of counsel and only after Appellant had filed an anticipated motion to reconsider.² The MIE of his own initiative re-opened the matter, without any requested relief from Plaintiff, to give Plaintiff the opportunity to submit additional testimony and evidence to correct fatal flaws with Plaintiff's case. Indeed, because the Order to re-open the trial pursuant to Rule 50(d), SCRCF was not only *sua sponte* and outside any court proceedings, it was impossible for the Appellant to simultaneously object. Nonetheless, as the record makes clear the Appellant did in fact raise objections at every opportunity in order to preserve this issue for appeal.

² Due to issues raised and objections made and the Oral ruling of the MIE, the MIE anticipated a motion for reconsider would be filed and Appellant did so within ten days of the oral ruling.

At the first hearing on June 20, 2013, the following exchange occurred:

[PLAINTIFF]: Your Honor, I feel I have an obligation to bring the Court's attention to what I believed caused all this confusion. The mortgage and modification agreement that was entered today as 2A had several exhibits attached to it. And incorporated is a recorded document that goes through all of the rate changes. That's what provides for the 6.375%.

THE COURT: *I haven't looked at that. . .*

THE COURT: Have you seen it? . . .

COURT: You disagree with it?

[APPELLANT]: Oh, yes, Your Honor. It takes this case on a whole different train. If they close their case it's either for the Court or not. Add –

COURT: You-all want to try it today or come back another day? . . .

[PLAINTIFF] You did admit the documents in, and I would argue that as by reference to it, the full document should be -- . . .

COURT: [Appellant], let me hear from you on this one.

[APPELLANT]: *It's not before you. It wasn't admitted. It wasn't admitted. It wasn't attached. It's after the fact.* But it changes the entire case. My argument is, there is no interest due on the this note. I'm happy to appeal that issue. What you have now in front of you is a possible new note. If it's a new note that they should have sued under they have a whole different issue with ownership; who it is, was there endorsement or not. *They tried their case as they chose to. I was aware of that document. But, Your Honor, I would object to the Court considering it. It wasn't entered. . . .*

COURT: I don't know. I tell you what, since they did get put in today I'll let you both move to reconsider³. We'll come back another day. I don't know what's that's going to do but -- . . . *Your argument will be whatever your holding in your hands should be considered as part of the 2A?*

[Plaintiff]: Should be.

COURT: *And is of public record?*

[Plaintiff]: And is of public record.

COURT: *So you'll have the public record exception to get that in another day and I don't know what that's going to do. . .*

[PLAINTIFF] We can take it up right now.

[APPELLANT] You Honor, I would object.

COURT: Let's just go ahead and do it. I want to know what you're objecting to, 2A?

[APPELLANT]: Not 2A that's before you that was entered. No. I object to the Court considering this – they chose to try their case. The case is closed. *If this is going to be considered a reconsideration the law is you don't get new evidence in on a motion to reconsider. . .* So I would object to the Court addressing this at this point in time. . .

COURT: All right. Okay. You're objecting to him making that part of the record?

³ Appellant moved to reconsider but the Plaintiff did not.

[APPELLANT]: I am. *This is the grounds for my objection, so the record is clear. The case is closed. This is new evidence. Under the rules it can't be. We don't have any testimony with regard to what you are no looking at. It hasn't been properly established with testimony.* . . . If this is a new note they should have sued, they had to establish the holder and ownership of that note. . . .

COURT: Okay. All right. Here's what we're going to do. This document 2A references an Exhibit A and Exhibit A2 and a B2. Do we have each of those documents?

[PLAINTIFF]: Yes, Your Honor.

COURT: All right. I'll allow you to staple those together. We're going to call that 2B. Okay? *And it's going to come into evidence over the objections of the Defendant who may then need to file another basis to reconsider.* I haven't looked at them yet. I'll look at them. *I'll let them in on the basis they should come in.* All right. . . . The question will be, to be or not to be. All right? . . . (App. 243 – 252)

Following the hearing Appellant filed a Motion to Reconsider on numerous grounds the fourth of which was that he MIE erred by admitting documentation after the closed of the case which no witness testified about and which Appellant had no opportunity to cross examine the witness about. (App. 122).

The MIE on July 11, 2013, *sua sponte* granted Plaintiff a new hearing stating:

*“After trial and review of the defendants Rule 59E, this court finds that the matter should be reopened for the express purpose of taking additional testimony with regards to the note and subsequent modification agreement. This is done pursuant to Rule 50(d), SCRCF. This matter is to be reset for Monday, August 12 at 10 a.m.”*⁴ (App. 18).

Pertinent testimony and remarks that occurred at the time of the second hearing, on August 12, 2014, are as follows:

COURT: “We were previously before the Court; had a hearing on June 20th of this year. . . . And at the end of that case the Court allowed some additional documentation to come into evidence. After that the Defendant filed a Rule 59(e) motion. The Court finds the matter should be reopened for the express purpose of taking additional testimony with regards to the note and subsequent modification agreement pursuant to Rule 50(d) and set this matter. . . . what I would like to do is

⁴ Appellant did not request the Master reopen the trial and Plaintiff never moved for said relief.

go ahead and get the testimony on the record this morning and then let's talk about some alternative avenues to resolve this matter.

[PLAINTIFF]: Thank you. Your Honor, I would call Ms. Mamie Clark back to the stand. As far as exhibits, would you like me to refer to the original?

THE COURT: Yes, I'll consider this to be a continuation. . .

[PLAINTIFF]: I hand you what's been marked as 2B. . .

[PLAINTIFF]: And 2A and 2B combined, were they recorded in the public records?

[WITNESS]: Yes. . .

[PLAINTIFF]: Ms. Clark, what did the modification agreement do to the terms of the note and mortgage?

[WITNESS]: It amended the terms of the note and mortgage. . .

[PLAINTIFF]: Your Honor, my understanding is this testimony would be limited solely to the note and modification so at this time, Your Honor, we would have no further questions for this witness.

THE COURT: *Okay. Did we go into the document 2B then? That was the one in issue?...*

COURT: *2B is the one I let in and we never did talk about. That's the only reason I reopened this thing, is to talk about 2B...*

THE COURT: *Is that the original?*

[PLAINTIFF]: *The original we're waiting on in west Columbia.*

[APPELLANT]: To make sure the records clear on this point, we have two documents. We're talking about 2A and 2B. Now we have a third document that's now presented that is a combination of those two documents? . . .

[APPELLANT]: For the purpose of the record, Your Honor, I would like to mark it as an exhibit. *I don't want it entered into evidence. I don't think it can be*, but so the record is clear for future purposes.

THE COURT: I think we need to give it a new name without being too confusing. Is it 2C? Does that make sense? My recollection is that – I was re-reading the record. Exhibit 2A came in. *2B originally did not.* . .

THE COURT: Of record. Let's call that one 2C. *I'm going to allow it into evidence over objection.* (App. 257-267)

On February 7, 2014, the MIE filed an Order of Foreclosure, which found all Exhibits were properly admitted “based on close review of Ms. Clark’s testimony that she was sufficiently familiar with the record keeping system for Selene.” (App. 25). On February 21, 2014, Appellant filed a second Motion to Reconsider which states:

“This Court improperly relied on Rule 50(d), SCRCP. First no motion was made by Plaintiff pursuant to Rule 50, SCRCP. . . the Court on its own accord provid[ed] the Plaintiff with an opportunity to correct evidentiary issues and present additional evidence after it had closed its case, remove[d] itself from being a neutral and placed itself in the role of any advocate on behalf of Plaintiff.

This Court should not have provided for a new hearing for the benefit of Plaintiff to present additional evidence and to correct evidentiary issues presented at the time of the hearing, when the Plaintiff had not sought that relief. This Court should have granted judgment in favor of Defendant due to lack of evidence and proof.” (App. 40-50).

In this case the record is replete with entries establishing that Appellant at every available opportunity objected to the MIE admitting Exhibit 2B and reopening the trial in order to allow Plaintiff to cure defects pursuant to Rule 50(d), SCRCP. Appellant objected to the admission of 2B on June 20, 2013, and again by a Motion to Reconsider on June 28, 2013. On August 12, 2015, Appellant objected to the introduction of 2C into evidence which is the combination of 2A and 2B. Finally, after the MIE issued the Order of Foreclosure Appellant again for the fourth time objected to the MIE admitting 2B into evidence and then reopening the trial pursuant to 50(d) to take additional testimony and allowing Plaintiff the further opportunity to admit the evidence into the record. To the extent the citation to authorities is intended to be a determination that Appellant did not preserve the issue as to error committed by the MIE in granting *sua sponte*, the Court of Appeals should be reversed.

B. *Sua sponte* relief in not available through Rule 50(d), SCRCP.

The Court of Appeals escaped addressing the impropriety of the *sua sponte* relief which warrants reversal by deflecting with a nonexistent preservation issue. Whether or not a court disfavors or favors foreclosure proceedings, all parties including consumers are entitled to fair treatment.

Rule 50(d), SCRCP addresses the process after a judgment notwithstanding the verdict is denied. Thus, for the Rule to be applicable here the MIE would have had to deny a motion notwithstanding the verdict for Appellant on June 20, 2013, which it did

not. Even if the Rule had application Rule 50 does provide for *sua sponte* relief. See *State v. Dicapua*, 680 S.E.2d 292, 383 S.C. 394 (S.C. 2009)(citing *Southern Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) (" The sole issue is whether a trial judge *ex mero motu* can grant a new trial on a ground not raised by a party. We hold he cannot.")): *See also, Heins v. Heins*, 543 S.E.2d 224, 344 S.C. 146 (Ct. App. 2001)(a Family Court judge does not have the authority to alter or amend a judgment, *sua sponte*, once the judgment is more than 10-days-old); and *Ellis v. Niles*, 316 S.C. 516, 459 S.E. 2d 631, 634 n.5 (Ct. App. 1994), vacated in part, reversed in part, 324, S.C. 223, 479 S.E. 2d 47 (1996)("Rule 50(a), SCRPC provides that a motion for directed verdict may be made at the close of an opponent's evidence. Moreover, the rule apparently does not give a trial judge authority to direct a verdict *sua sponte*. Compare Rule 19, SCrimP (specifically providing that court shall direct a verdict on motion of the defendant or on its own motion if there is a failure of evidence.))."

Rule 50(d), SCRPC, had no application. On July 11, 2013, 21 days after trial, the MIE *sua sponte* ordered a new hearing to reopen the matter to take additional testimony. Plaintiff did not move for a directed verdict at trial. Moreover, at the time the Court acted *sua sponte*, no verdict or ruling had been granted in favor of Plaintiff. It was prejudicial error for the MIE to act *sua sponte*.

"Every litigant, both civil and criminal, is entitled to an impartial neutral finder of fact." *Day v. Kilgore*, 444 S.E.2d 515, 517 (1994). In *Kilgore*: "the jury requested a photograph which was not entered into evidence on direct examination of the witness, cross-examination, re-direct or re-cross. The trial judge then allowed counsel for the Plaintiff, over defendants' objection, to lay a foundation and enter the photograph into

evidence.” *Id.* “The adversary theory as it has prevailed for the past 200 years maintains that the devotion of the participants, judge, juror, and advocate, each to a single function, leads, to the fairest and most efficient resolution of dispute. *The production of evidence is a function of the advocate and not the judge or jury.* Where, as here, the roles of advocate, judge, or jury become intermingled, the fundamental basis of our adversarial system is undermined.” *Id.*

This case is akin to *Kilgore*. With all due respect to the MIE, the MIE by his own accord provided Plaintiff with an opportunity to correct evidentiary deficiencies after the close of its case. By so doing, the MIE removed his neutrality and placed himself in the role of an advocate on behalf of Plaintiff. This is exemplified by a several different instances during the June 20, 2013, trial: (1) Plaintiff’s counsel questioned Plaintiff’s witness about judgment figures and then asked the witness if the information was contained in what had been marked Exhibit 9. Plaintiff had not attempt to enter Exhibit 9 it into evidence and concluded it’s direct. The MIE, however, stopped Plaintiff and instructed Plaintiff to offer Exhibit 9 into evidence and then over Appellant’s objection admitted the exhibit. (App. 209-211); and (2) during Appellant’s cross-examination of Plaintiff’s witness relating to Note 1 and its interest provision, Plaintiff’s witness admitted Note 1 did not state the interest rate which had been charged upon the loan. Immediately, Plaintiff’s counsel interjected stating to the Court: “If you want to do redirect right now we can slow this down. I can show the Court where it’s clearly there.” The Court responded: “I’m with you” and asked Appellant “You’re trying to get her to agree to that?” Appellant stated: “Yes.” Then the Court instructed Plaintiff: “You have to

rehabilitate your witness”. (App. 221)⁵. Then when the Plaintiff brought Exhibit 2B to the Court’s attention after the conclusion of the trial, the MIE informed the parties he would reopen the matter at a later date and then instructed the Plaintiff that it should use the public records exception to have the Exhibit admitted into evidence. (App. 245-247). The MIE should not have provided *sua sponte* relief and intermingled his role by offering aid and assistance to Plaintiff in the prosecution of its case and the Court of Appeals should not have rubber stamped his actions.

II. THE ASSIGNMENT OF THE MORTGAGE SEPARATE FROM THE TRANSFER OF THE NOTE KEPT PLAINTIFF FROM RECEIVING AND INTEREST IN THE MORTGAGE.

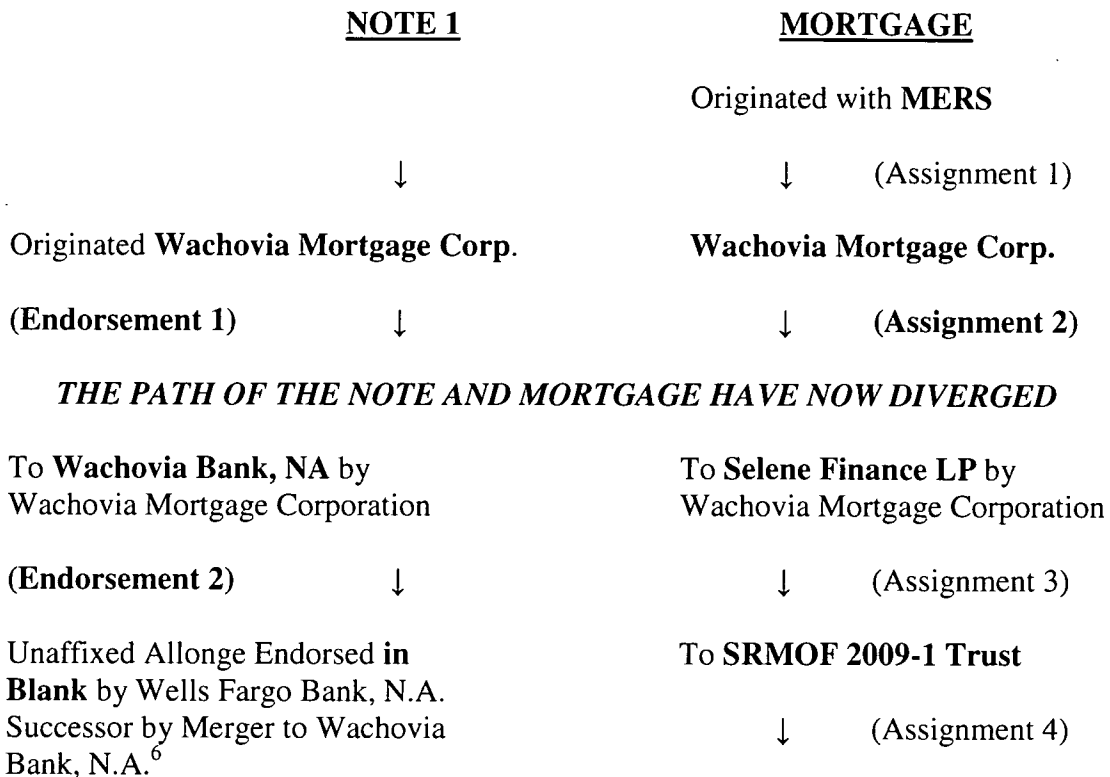
A. By ignoring the fact the note and mortgage took divergent paths the Court of Appeals erred by allowing the enforcement of a mortgage held by another.

Where a negotiable note is secured by mortgage, the note and mortgage are inseparable, and the assignment of the note carries the mortgage with it, while an assignment of the mortgage alone is a nullity. *Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313, (1872); *In re Leisure Time Sports, Inc.* 194 B.R. 859, 861 (9th Cir. 1996) (stating that “[a] security interest cannot exist, much less be transferred, independent from the obligation which it secures” and that, “[i]f the debt is not transferred, neither is the security interest”); *Kelley v. Upshaw*, 39 Cal. 2d 179, 192 (1952) (stating that assigning only the deed without a transfer of the promissory note is completely

⁵ On re-direct Plaintiff failed to provide any evidence supporting the witness’ statement that the Note provide an interest rate of 6.375%. (App. 226-228). Moreover, thereafter the Court, based solely on its own opinion and belief and absent anything evidence in the record, then theorized the loan was a one year construction loan which carried an interest rate of the prime index plus 0%, and was then the rolled into permanent financing wherein the Note carried an interest rate based on the Libor Index plus 2.25%. The MIE’s theory has no basis from the evidence of record. Which is why the Master noted: “I don’t know how they got there. If you can show me something otherwise. I see the asteric in there but you have to read the whole document.” To which Appellant responded. “Your Honor, yes, I agree. *You’re stuck with the four corners of the document created by this Plaintiff.*”

ineffective); *see also* Restatement (3d) of Property (Mortgages) § 5.4 (stating that “[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation that the mortgage secures”); *South Carolina Nat. Bank v. Halter*, 293 S.C. 121, 359 S.E.2d 74 (S.C. App. 1987) (The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee, *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930)(absent some indication that the parties also intended to transfer the debt. 59 C.J.S. Mortgages Section 359 (1949)).

Here it is undisputed and the evidence shows the assignments of Mortgage do not follow the endorsements of Note 1. The sequential transfers of Note 1 and Mortgage admitted into evidence are illustrated below:



⁶ Note 1 also bears two endorsements on its face. One endorsement is marked void and the other is marked cancelled. It is presumed that the voided and cancelled endorsements, which are on the Note rather than unaffixed allonge, predate Endorsement 2. However no dates were provided for any of the alleged

To Selene RMOF REO Acquisition, LLC

↓ (Assignment 5)

To Wilmington Savings Fund Society,
d/b/a Christiana Trust as Trustee of the
American Mortgage Investment Partners
Fund I Trust

Assignment 1 transfers the Mortgage from MERS to the original Plaintiff, Wachovia Mortgage Corporation. After this action was initiated, Assignment 2 conveyed the Mortgage from Wachovia Mortgage Corporation to Selene Finance, LP. Assignment 2 directly conflicts with the chain of title (transfers) to Note 1. Endorsement 1 of Note 1 transfers Note 1 from Wachovia Mortgage Corporation to Wachovia Bank, N.A., not to Selene Finance, LP (the path of the mortgage). It is not until Note 1 and Mortgage take divergent paths that Endorsement 2 appears. Endorsement 2 executed by Wells Fargo Bank, N.A., successor to Wachovia Bank, N.A., purports to transfer Note 1 by blank endorsement contained in an unaffixed allonge. Plaintiff relies upon Endorsement 2 to enforce Note 1 as its holder. The Mortgage and Note depart from each other prior to the endorsement in blank. Wachovia **Mortgage Corporation** and Wachovia **Bank, NA** are separate entities. The Mortgage was assigned directly from Wachovia Mortgage Corporation to Selene Finance, LP when Wachovia Mortgage Corporation did not hold an interest in the Mortgage to assign because it had already transferred Note 1 to Wachovia Bank, N.A. Plaintiff did not establish a right to enforce the Mortgage because the Mortgage stopped in its path and did not make its way to the Plaintiff. The divergent path of the mortgage effectively precluded Plaintiff from receiving an interest in the

endorsements and Plaintiff's witness stated she had no knowledge as to any of the endorsements other than what was discernable from simply examining them.

mortgage and therefore prohibit it from foreclosing. It was error for the MIE and Court of Appeals to gloss over this issue and refused to recognize the principle that an independent assignment of the mortgage is nugatory. *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930).

Additionally, Plaintiff introduced a second note (Note 2). Note 2 was admitted into evidence *sua sponte* by the MIE as 2B. Note 2 contains no endorsement and is payable only to Wachovia Mortgage Corporation. Note 2 never having left Wachovia did not make its way to Plaintiff. Thus, Plaintiff having no interest in Note 2, it could not rely on it to enforce a right to foreclosure. Moreover, because there is no subsequent endorsement of Note 2 every assignment of the Mortgage after Assignment 1, to Wachovia Mortgage Corporation is void. Again, Plaintiff did not receive a right to enforce the Mortgage as security for Note 2 or Note 1.

B. Possession of a note is not tantamount to holder status of a note without proof of transfer of rights.

Article 3 of the Uniform Commercial Code (“UCC”) governs actions to enforce negotiable instruments. *Swindler v. Swindler*, 355 S.C. 245, 251, 584 S.E.2d 438, 440-441 (Ct. App. 2003), S.C. Code Ann. §36-3-301 (Supp.2012) provides: “Person entitled to enforce an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d).” “Holder means the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession.” “[I]f an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an

instrument is payable to bearer, it may be negotiated by transfer of possession alone.” S.C. Code Ann. §36-3-201(b). “[S]ome rights of the transferor are not vested in the transferee unless the transfer is a negotiation. . . . The right to enforce an instrument and ownership of the instrument are two different concepts. . . . Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3. . . . a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument.” *Official Comment 1 to S.C. Code Ann. §36-3-203.*

Here, Plaintiff claimed holder status of the Notes which proposition the MIE agreed with on the assumption that the possession of an instrument renders one a holder. That simply is incorrect and error of law.

“If an instrument not in the possession of the original holder is *not properly indorsed*, then the person in possession of it does not have the status of holder.” *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84 (Tex. App. 2012). The official commentary for *S.C. Code Ann. §36-3-203* (b) provides:

that transfer vests in the transferee any right of the transferor to enforce the instrument 'including any right as a holder in due course.' If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder. At that point the transferee is entitled to the presumption under Section 3-308.” *Official Comment 2 to S.C. Code Ann. §36-3-203.*

Though the official comments address a transferee's obligation to prove its right as a holder, the issue appears to be a novel one for South Carolina Appellate Courts. Indeed the Commentary makes clear a nonholder in possession must account for his possession of the unendorsed paper by proving the transaction through which he acquired it. *See also, Anderson v. Burson*, 35 A.3d 452, 462, 424 Md. 232 (Ct. App. MD 2011) (A nonholder in possession may enforce an instrument if his transferor was a holder because the transferee obtains the rights of his transferor. A nonholder in possession, however, cannot rely on possession of the instrument alone as a basis to enforce it. The transferee's right to enforce the instrument derives from the transferor and therefore those rights must be proved. The transferee does not enjoy the statutorily provided assumption of the right to enforce the instrument that accompanies a negotiated instrument and so the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. If there are multiple prior transfers, the transferee must prove each prior transfer); *In re Hilhelm*, 407 B.R. 392, 401-04 (Bankr Ct. D. Idaho 2009) (A nonholder in possession of the instrument who has the rights of a holder must prove the transaction by which they acquired the note. . . Movants seem to presume that the assignments of mortgage standing alone entitle them to enforce the underlying notes, such presumption is unfounded however because Movants have not established MERS's authority to transfer the notes).

Contrary to the MIE's position and the Court of Appeals, waiving a Note⁷ about is not all that is needed to be a holder. As asserted by Appellant, Plaintiff was required to prove its right to enforce the Notes by proving up the chain of title and transfer of right.

⁷ Plaintiff failed to prove possession of Note 2 (App. 265).

The Plaintiff needed to prove how it got the Note and transfers that it claimed occurred to and from Selene Finance LP, SRMO 2009-1Trust and Selene RMOF REO Acquisitions, LLC. The Plaintiff did not offer up any proof and the MIE's failure to require such was an error of law. Possession of a note alone does not prove an entity has the rights of holder.⁸ (App. 189-201).

III. Plaintiff's failed to proffer any properly admissible evidence.

A. The witness lacked sufficient knowledge to testify.

Rule 602, SCRE, states: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony..." Plaintiff's witness testimony was insufficient to establish personal knowledge or lay a proper foundation for the admission of Exhibits.

The witness testified she was employed by Selene Finance, LP, and held the title of Contested Default Case Manager whose duties include "review loans where there are differences to attempt to resolve those issues" and testify at trials. (App. 187). She testified she was not an employee of Plaintiff (App. 212) and had never worked for any of the Plaintiff's predecessors. (App. 211-212). She further testified she was not the custodian of records but that Selene Finance, L.P. was the custodian. (App. 213). The witness testified she had no knowledge about the markings of void and/or cancelled on Note 1 or when any of the endorsements had been created. (App. 214-215). The witness

⁸ This is a common misconception in our courts of equity, as noted by the MIE's ruling in this case. It is further exemplified by Plaintiff's witness's testimony. Appellant asked the witness if she had any evidence to show when Plaintiff came into possession of the note and when it was transferred Plaintiff. The witness responded that the only evidence she had of the transfer of the Note to the Plaintiff was the assignments of the Mortgage (App. 215) which again shows a misunderstanding of what is required to enforce a note.

testified that the documents in question were not prepared by Selene Finance, LP or Plaintiff. (App. 216). The witness testified she had no evidence or testimony that established the chain of title of Note. (App. 215). She offered no testimony which would establish how or when Plaintiff came in possession of the Note or when it had been transferred to Plaintiff. (App. 214-216). Notably the witness never testified how records were retained; the means of retention of records by Plaintiff or her employer; computer systems used by Plaintiff or her employer; how data is entered or maintained by Plaintiff or her employer; or procedures used for obtaining records. Plaintiff failed to establish the witness had the required personal knowledge as required by Rule 602, SCRE to testify or authenticate the documents. See *Hundley ex rel. Hundley v. Rite Aid of South Carolina Inc.*, 339 S.C. 285, 529 S.E. 2d 45 (Ct. App. 2000)(“generally under Rule 602, SCRE [a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). The Court of Appeals contrary to its decision in *Deep Keel, LLC v. Atlantic Private Equity Group*, Op. No. 5320 (June 17, 2015) determined the evidence was not hearsay and along with the lower court erred in that determination.

B. Plaintiff failed to establish an exception to the hearsay rule.

Rule 803(6), SCRE, provides an exception to the hearsay rule for qualified business records.⁹ “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

⁹ “Rule 803(6), SCRE, provides that memorandum, reports, records, etc. . . are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court.” *Ex Parte Dept. of Health & Env. Control v. John Doe*, 350 S.C. 243, 249-50, 565 S.E.2d, 293, 297 (2002).

matter in question is what its proponent claims.” Rule 901, SCRE. “Establishing that a witness is qualified to testify about a business record does not automatically lead to the admission of that record. The qualified witness must then lay the foundation to meet the requirements of Rule 803(6) and section 19-5-510.” *Deep Keel, LLC*, Opinion No. 5320, p. 12 (Ct. App. 2015); *see also, Stevens v. Allen*, 336 S.C. 439, 455, 520, S.E.2d 625, 633 (Ct. App. 1999) (Even under Rule 803(6), SCRE, a proper foundation must be laid for admittance of the evidence, *and this includes chain of custody*). Additionally, “[t]he plain language of Rule 803(6) allows for the admission of “[a] memorandum, report, record, or data compilation, not testimony describing such a document.” *Deep Keel*, Op. No. 5320, p. 10 (Ct. App. 2015). A business record although relevant and otherwise admissible is properly excluded from evidence where it is not offered through a custodian or another qualified witness. *Connelly v. Wometco Enterprises, Inc.* 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct. App. 1994). “A person is a qualified witness under [803(6)] if the testimony conveys information from a person with knowledge at the time the records were created.” *Id.* Studying the manner in which a predecessor maintained the records may qualify someone as a qualified witness. *See Id.* A qualified witness must be able to testify to the mode of preparation of a business record. *Ex Parte Dept. of Health & Env. Control*, 350 S.C at 250, 565 S.E.2d at 297. “A business record without evidence about the manner in which it is prepared or the source of its information does not meet the requirements in S.C. Code Section 19-5-510 or Rule 803(6), SCRE. Business records entries must have been made at or near the time of the act to which they relate; the purpose of this mandate is to aid in establishing that the record was honestly and fairly kept...” *State v. Rice*, 375 S.C. 302, 652 S.E. 2d 409 (Ct. App. 2007).

There is a three part test to establishing by witness testimony that a business record meets an exception found in 803(6), SCRE, and thus may be admitted into evidence over an objection of hearsay. First it must be established that the witness is a qualified witness. Second, the witness must lay a proper foundation for the record establishing all required elements of 803(6), SCRE, including: 1) that the record was prepared near the time of the event recorded; 2) prepared by someone or from information transmitted by a person with knowledge; 3) prepared in the regular course of business; and 4) identified by a qualified witness who can testify as to the mode of preparation of the record. Finally, after the first two steps have been met the court must determine if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

With regard to the first step Appellant asserts Ms. Clark was not a qualified witness.¹⁰ As to the second part of the test, with regard to every exhibit Plaintiff sought to admit during the initial trial, Plaintiff's witness failed to testify whether 1) the record was prepared near the time of the event recorded, 2) prepared by someone or from information transmitted by a person with knowledge, 3) prepared in the regular course of business, or 4) the mode of preparation of the record and the chain of custody of the document. Appellant objected in each instance on the basis of hearsay arguing a proper foundation had not been laid. (App. 189-211). Additionally, with regard to 2B, Plaintiff's witness at the initial hearing never provided any testimony. Finally during the second hearing on August 12, 2013, Plaintiff failed to lay a proper foundation by witness testimony for the admission of 2C. Every exhibit which Plaintiff entered into evidence

¹⁰ See argument supra at pages 17-18.

on June 20, 2014, should have been excluded because a proper foundation was not established for the admission of each exhibit.

Finally as to the third part of the test the MIE, over Appellant's objections, failed to assess the trustworthiness and reliability of the Exhibit. This is true particularly with regard to Exhibit 1 (Note 1) and 2B (Note 2). With Note 1 Appellant called the MIE's attention to the fact that Note 1 contained endorsements which had been both canceled and voided, as well as the unaffixed allonge which Plaintiff relied upon for standing. Plaintiff's witness testified she had no knowledge of both the endorsement issues or the time and condition in which Note 1 came into Selene Finance, LP's possession. Further Ms. Clark equivocated as to whether it was even her duty to be knowledgeable as to those issues as her title was not custodian of records. The MIE ignored all of these factual irregularities, all of which called into question the trustworthiness of Plaintiff's exhibits. .

Finally with regard 2B (Note 2), two months after the initial hearing the MIE held a second hearing solely for the purpose of providing testifying as to the authenticity, construction, and implications of 2B. However, at the second hearing Plaintiff failed to bring the original of exhibit 2B. Rule 1002, SCRE, states "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Rule 1003, SCRE, states "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." In this case both a genuine question as to authenticity of the original and circumstance that it would be unfair to admit the duplicate in lieu of the original are both present. The MIE erred by admitting

2B (Note 2) which Plaintiff's witness did not testify to at the initial hearing and failed to produce the original at the second hearing.

Plaintiff failed to establish Plaintiff's witness could testify as custodian of records or other qualified witness pursuant to 803(6), SCRE. Plaintiff failed to lay a proper foundation by witness testimony for the documents to be considered business records pursuant to Rule 803(6), SCRE. Third, the court failed to consider whether the records lacked trustworthiness before admitting them. Therefore the Court of Appeals erred in holding that Plaintiff's exhibits were not hearsay and could be admitted into evidence. Neither a proper foundation nor an exception to hearsay was established by Plaintiff for any document entered into evidence.

IV PLAINTIFF DID NOT PROVIDE EVIDENCE IT WAS ENTITLED TO INTEREST.

"A note is a written instrument, and in computing the amount due thereon in principal and interest the computation must be made in accordance with the terms of said note." *Wilmington Savings Fund Society FSB v. Furmanchik*, Opinion No. 2015-UP-353 (Filed July 15, 2015) (quoting: *Rhodus v. Goins*, 129 S.C. 40, 41, 123 S.E. 645, 645-46 (1924)). "Under the UCC in South Carolina, a transfer of an instrument vests in the transferee such rights as the transferor has therein." *Twelfth RMA Partners, L.P. v. National Safe Corporation*, 335 S.C. 635, 663-664, 518, S.E.2d 44 (Ct. App. 1999). In opining upon the Appellants case the Court of Appeals clearly noted in order to determine the amount of interest owed upon Note 1 which the Plaintiff was seeking to enforce, the appropriate action was to look to the terms of Note 1. "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Ellie*,

Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). If a “contract is clear, explicit, unambiguous, and capable of only one reasonable interpretation, the court does not look beyond the four corners to discern the parties intentions.” *Silver v. AABSTRACT Pools & Spas, Inc.*, 376 S.C. 585, 592, 658 S.E.2d 539 (Ct. App. 2008).

In this case, during the trial on June 20, 2013, the Plaintiff proffered Note 1 which was admitted into evidence as Plaintiff’s Exhibit 1. Note 1 contains in interest rate of 0% as the amount owed up until after the Change Date of October 1, 2011¹¹. On cross-examination the witness testified as follows:

[APPELLANT]: I want to make sure that the Court understands and it’s clear, there is no interest rate provided for in this note?

[WITNESS]: No, there is not. . .

[APPELLANT]: There is no interest owed under that note, that note identified as Exhibit Number 1, correct? . . .

[WITNESS]: No. Not that I can see.

[APPELLANT]: So any calculations as to interest owed, there would be no interest owed; correct?

[WITNESS]: On this particular document it does state that the interest in paragraph 2 – it has the interest is zero.

[APPELLANT]: So your prior testimony when you did your summary of damages and you claimed \$105,069.78 was owed, there is no interest owed, not under that document?

[WITNESS]: Not under this document.” (App. 218-220).

Note 1 on its face does not provide that any interest was owed on this loan on this loan until after this action for foreclosure was initiated. The contract is unambiguous and not open to interpretation, and therefore you must look only to the four corners of the document before the Court. Note 1 and the evidence before the Court during the trial on June 20, 2014, make clear that Plaintiff was not entitled to the interest it claimed it was owed. *See Lowcountry Open Land Trust v. Charleston Southern University*, 376 S.C. 399, 656 S.E. 2d 775 (Ct. App. 2008)(“A court has no authority to rewrite a contract and

¹¹ This foreclosure action was initiated in 2010 prior to the rate change.

impose unwanted obligations and terms under the guise of specific performance or judicial construction.”). The Court of Appeals determination that Plaintiff was entitled to said interest was an error of law.

CONCLUSION

For the reasons given, this Court should grant this petition for writ of certiorari. The decision of the Court of Appeals and the lower court should be reversed and the rights of a consumer to a fair trial should be pronounced.

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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2010-CP-10-5825
Appellate Case No. 2014-000906
2015-UP-353

RECEIVED
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S.C. Supreme Court

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Trustee of the
American Mortgage Investment Partners Fund I Trust.....Respondent,

v.

Melissa Furmanchik; Masonborough at Park West Association, Inc.
and Wells Fargo Bank, N.A.,.....Defendants,

Of whom Melissa Furmanchik is the.....Petitioner.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Petition for Writ of Certiorari, Appendix upon
counsel for Respondent named below by depositing a copy of the same in the United States Mail,
postage prepaid on October 5, 2015, addressed as follows:

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